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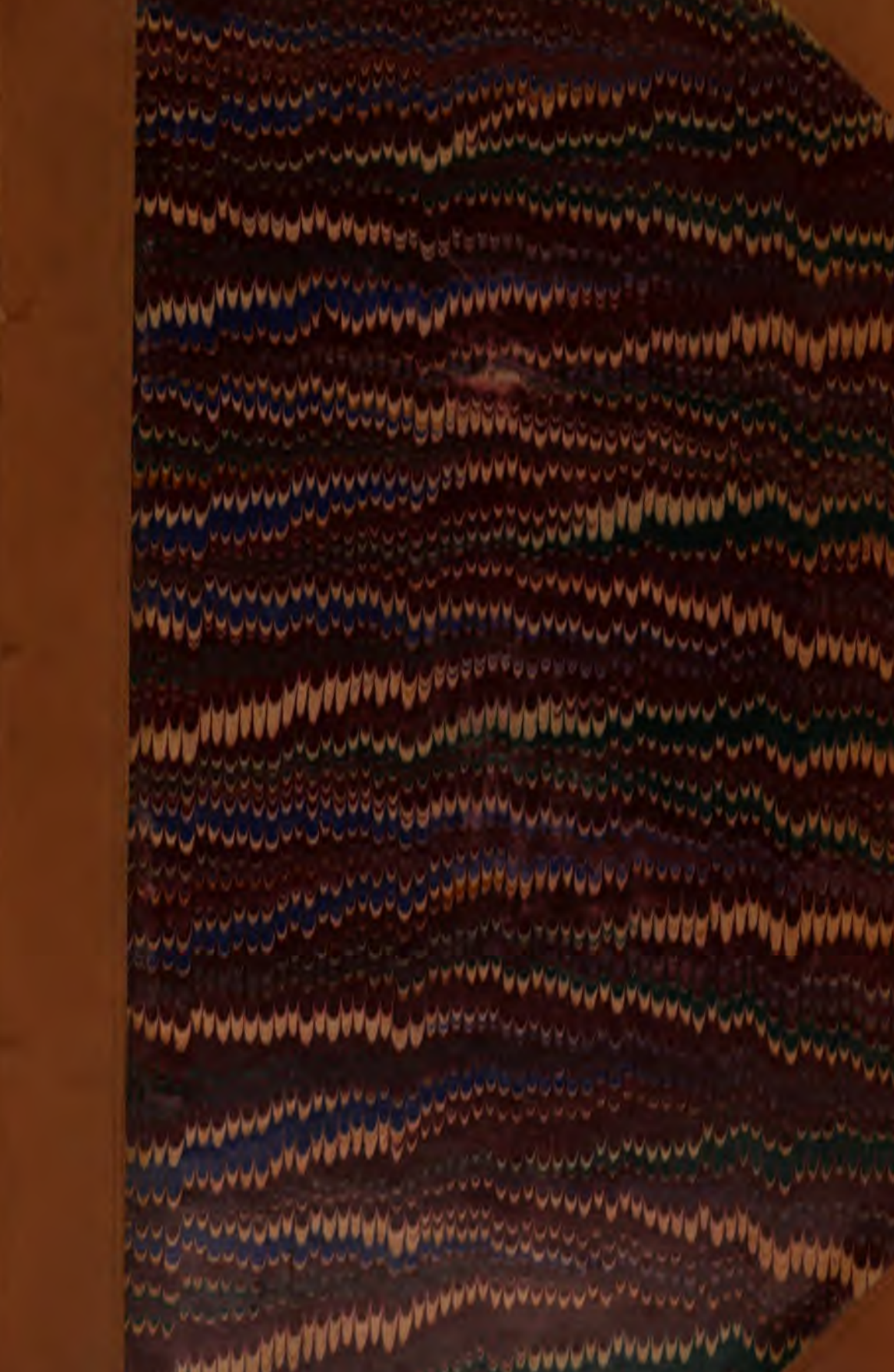

THE

MONTREAL LAW REPORTS.

COURT OF QUEEN'S BENCH.

JAMES KIRBY, Editor.

CASES DETERMINED IN THE COURT OF QUEEN'S BENCH, MONTREAL.

1891.

(With some cases of previous years.)

CONTRIBUTORS: *(Reports distinguished by initials.)* JAMES KIRBY. W. A. WEIR.

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1891.

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JUDGES

OF THE

COURT OF QUEEN'S BENCH.

1891.

THE HON. SIR ANTOINE AIMÉ DORION, KT., *and from Sept.* 16, 1891, } *Chief Justice.*

THE HON. ALEX. LACOSTE, }

" ULRIC JOSEPH TESSIER, }

" ALEXANDER CROSS,

" LOUIS FRANÇOIS GEORGES BABY, } *Puisne Judges.*

" JOSEPH G. BOSSÉ.

" JEAN BLANCHET, }

" J. S. C. WURTELE, *Assistant Judge.*

Attorney General:

THE HON. T. C. CASGRAIN.

Clerk of Appeals:

L. W. MARCHAND.

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Erratum. On page 368, read 7 S.C. for 6 S.C.

REPORTS OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH IN APPEAL,

MONTREAL.

January 24, 1891.

Coram DORION, C. J., BABY, BOSSÉ, DOHERTY, JJ., TAIT, J. *ad hoc.*

WILLIAM H. JEFFREY,
(*Plaintiff in Court below*),
APPELLANT;

AND

THE CANADA SHIPPING CO.,
(*Defendants in Court below*),
RESPONDENTS.

Carrier—Bill of lading—Place of destination of goods beyond carrier's route.

HELD:—Where the place of destination of goods is beyond the carrier's route, and he receives the goods under a bill of lading to the terminus of his route, and carries them safely to that point, to which alone he received the freight, the fact that at the request of the shipper he undertook to deliver the goods to another carrier to complete the transportation, does not make the first carrier responsible for the delivery of the goods at the place of destination.

APPEAL from a judgment of the Superior Court, Montreal (MALHIOT, J.), January 25, 1889, in the following terms:—

1891.

Jeffrey & Canada Shipping Co.

"La Cour etc.....

"Vu que le connaissement, signé par la défenderesse à Montréal, le 8 octobre 1885, pour le transport de l'amiante (asbestos) mentionné en la déclaration en cette cause, est à l'effet qui suit, savoir: 'Shipped, in good order and 'condition by W. H. Jeffrey, in and upon the screw 'steamship *Lake Nepigon*; whereof, etc., and bound for 'Liverpool, etc., one hundred and twelve bags asbestos, 'being marked and numbered as in the margin, and are 'to be delivered from the ship's deck (where the ship-'owner's responsibility shall cease) in like good order 'and well conditioned, etc., at the port of Liverpool, etc., 'unto order to Genoa, or to the assigns; freight and pri-'mage payable by shipper at the rate of fifteen shillings 'sterling per gross ton to Liverpool, freight Liverpool to 'Genoa, payable by consignee.'

"Considérant que par ce connaissement la défenderesse a contracté envers le dit demandeur l'obligation de livrer la dite amiante en bon ordre emporté de Liverpool à ordre, c'est-à-dire au demandeur porteur du connaissement, ou à toute autre personne porteur du dit connaissement dûment endossé par le demandeur; que le fret n'a été fixé que jusqu'au port de Liverpool et a été payé par le demandeur à la date du connaissement jusqu'à Liverpool seulement;

"Considérant que les mots qui se trouvent dans le dit connaissement et qui indiquent que la destination définitive de la dite amiante était le port de Gènes en Italie, et que le fret de Liverpool à Gènes serait payé par le consignataire, ne sauraient être interprétés comme constituant une obligation de la part de la défenderesse dont la ligne de vapeur n'allait pas plus loin que Liverpool et qui n'avait pas de concordance avec des lignes de transport allant à Gènes de transporter la dite amiante jusqu'à Gènes, interprétation qui ne serait justifiée ni par les termes du connaissement ni par les circonstances de l'affaire, et que ces mots peuvent tout au plus comporter un mandat gratuit, par lequel la défenderesse se serait chargée de faire transmettre la dite amiante à bord d'un vais-

seau allant à Gènes, pour être livrée là au demandeur, porteur du connaissement ou à ses ayants cause, ou à un consignataire que lui indiquerait le demandeur ou ses ayants cause porteurs du connaissement;

"Considérant qu'aussitôt ou peu de temps après avoir reçu le dit connaissement de la défenderesse le demandeur l'a endossé en faveur de la banque dite The Bank of British North America laquelle s'est trouvé substituée dans tous les droits du demandeur, en vertu de ce connaissement, et que lors de l'arrivée de la dite amiante dans le port de Liverpool c'était la dite banque qui était porteur et en possession du dit connaissement, et qui avait seulement le droit d'en recevoir livraison en échange du dit connaissement, et de donner des ordres ou directions à la défenderesse relativement à la dite amiante;

"Considérant que c'est la dite Banque elle-même qui, en réponse aux recherches faites par l'agent de la dite défenderesse à Liverpool pour savoir quels étaient les consignataires de la dite amiante, a informé le dit agent qu'elle était porteur du connaissement, et que la dite amiante devait être envoyée à Gènes, et que les consignataires étaient MM. Develle, Pelli & Co.;

"Considérant que la dite Banque et ses employés, agents ou ayants cause paraissent s'être inquiétés fort peu de la dite amiante tant à Liverpool qu'à Gènes;

"Considérant que le demandeur est lié par les faits de la dite Banque et responsable de ses omissions et négligences, et qu'il ne peut avoir plus de droit contre la défenderesse que la dite Banque en aurait eu elle-même si elle eût elle-même poursuivi la défenderesse en vertu du dit connaissement;

"Considérant qu'il est établi que la dite défenderesse a rendu la dite amiante dans le port de Liverpool en bon ordre et condition tel qu'elle y était tenue par son contrat contenu dans le dit connaissement et à celle qui lui a été donnée par la dite Banque, porteur du dit connaissement et qui était aux droits du dit demandeur, elle a fait embarquer la dite amiante sur un bon steamer "The Persian" en destination pour la ville de Gènes, en Italie, et

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appartenant à une compagnie solvable, laquelle s'est obligée par un connaissement en bonne et due forme à transporter la dite amiante à Gènes et à ne la livrer qu'en échange du connaissement donné par la défenderesse au demandeur à Montréal le 8 octobre 1885, et cité en la déclaration en cette cause, et que la dite défenderesse a ainsi accompli toutes les obligations auxquelles elle était tenue ;

"Déboute l'action du dit demandeur avec dépens, distraits, etc."

Jan. 15, 1891.]

J. N. Greenshields, *Q. C.*, for the appellant :—

The respondents are common carriers operating a line of steamers sailing from the port of Montreal to foreign ports.

On the 8th of October, 1885, the respondents issued a certain bill of lading whereby they acknowledged to have received from the appellant one hundred and twelve bags of asbestos to be shipped in the steamship Lake Nepigon.

The appellant contends that under the terms of this bill of lading they the respondents were obliged to deliver the goods at Genoa—while the respondents contend that their obligations terminated on the delivery of the goods at Liverpool.

The goods were lost, in so far as appellant is concerned, between Liverpool and Genoa, they having been delivered without the production of the bill of lading, which was held by the appellant or his assignee, the Bank of British North America.

In the absence of a special contract the receiving carrier's liability extends through the carriage and delivery by a connecting carrier.

Muschamp v. *Lancaster Ry.*, 8 M. & W. 421.
Mylton & Midland Ry., 28 L. J. Exch. 385.
Bristol Ry. & Collins, 29 L. J. Exch. 41.
Crouch v. *London Ry.*, 23 L. J. C. P. 73.
Wilby v. *Cornwall Ry.*, 27 L. J. Exch. 181.

Muschamp v. *Lancaster Ry.*, is the leading case, and established the rule in England that the liability of one of several connecting carriers who received goods for transportation consigned to a point beyond his own line extends throughout the journey and until there has been a complete delivery to the consignees, unless he has made a special contract limiting his liability to his own line. The reasons urged in favor of this rule are various and forcible. It is said that the consignor cannot be supposed to know in the case of a continuous line who are the owners of its different portions. He may fairly assume either that the first carrier owns the continuous line or that he intends to so represent, and contracts upon that basis. It is neither reasonable nor just to construe the agreement as a contract with separate companies and to force the consignor to seek his remedy against the carrier on whose line the loss occurred.

S. Cross for the respondents :—

Respondents contend that their bill of lading was only from Montreal to Liverpool, and the document states so in unmistakable terms on its face, and in place of through freight from Montreal to Genoa being stipulated, as would be the case on a through bill of lading, the freight is given from Montreal to Liverpool only, and was paid by appellant, and the freight from Liverpool to Genoa, should the stuff be sent there, was not even fixed, and was to be paid at Genoa.

Respondents could not have claimed, themselves, to send the stuff on to Genoa, for appellant or his assigns might, on its arrival at Liverpool, have taken the stuff, or have changed its destination to some other port, and respondents could have had nothing to say to the contrary.

If there was any obligation on respondents beyond delivery of the stuff at Liverpool, it was merely to see to the forwarding of the stuff from Liverpool, addressed to whoever might be indicated by appellant or his assigns as the consignees of the stuff at Genoa, or elsewhere, and this indication was given to them by the Bank, the hol-

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ders of the bill of lading, on receipt of which Roberts at once caused the stuff to be shipped on the steamer "Persian," of the Leyland Line, and did so, with extreme care in regard to the bill of lading which he procured from the Leyland Line, taking every proper precaution as to the stuff. The only trouble was that the Leyland Line, which is a first class line of steamers in every respect, made a mistake through their agent at Genoa and gave the wrong delivery there.

As to respondents' bill of lading being a local one from Montreal to Liverpool only, respondents would refer to Hutchinson on Carriers, §760, page 589 : "As, for instance, "in the case of successive lines of carriers, over all of "which the goods must pass in order to reach destina- "tion, it would not be enough to show that the goods "had never reached such destination and must therefore "have been lost or stolen somewhere upon the route, but "the carrier by whose negligence, etc., the loss has oc- "curred must be sought out and the responsibility must "be fixed upon him for proof."

See *Zinz* v. *S. E. Ry. Co.*, 42 Q. B. 539.

Kent v. *M. Ry Co.*, L. R., 10 Q. B. 1.

Hutchinson on Carriers, page 115, § 145-152.

"But where the place of destination is not upon the "carrier's route, and he receives the goods under a con- "tract to send or forward them by his own route to the "point most convenient to their destination reached by "him, and there to deliver them to an agent or to another "carrier to complete the transportation, he cannot be "made liable for the goods beyond the terminus of his own "line, and if he safely delivers to such agent or carrier, "he will have complied with his contract and will be "discharged from all further liability."

Jan. 24, 1891.]

TAIT, J., (for the Court) :—

The appellant claims the value of a quantity of asbestos which he alleges respondents contracted to convey from Montreal to Genoa in Italy, and to deliver there to

his order but which they failed to do, the goods having been delivered there to the wrong person without the production of the bill of lading. The Superior Court dismissed the appellant's action. The facts are simple enough. The respondents own a line of steamers called the "Beaver Line" running between Montreal and Liverpool, and appellant shipped on the "Lake Nepigon," one of the steamers of the line, 112 bags of asbestos, value admitted to be $840, under a bill of lading dated 8th Oct. 1885, which leaving out immaterial portions reads as follows: —

"Shipped in good order and condition by Mr. Jeffrey "in and upon the screw steamship called the 'Lake "Nepigon,' bound for Liverpool, one hundred and twelve "bags asbestos, to be delivered from the ship's deck "(where the ship owner's responsibility shall cease) in "the like good order and well conditioned at the port of "Liverpool * * * unto order Genoa, or to its assigns, "freight and primage payable by shipper at the rate of "fifteen shillings sterling per gross ton to Liverpool, "freight Liverpool to Genoa payable by consignee—the "goods to be received by the consignee immediately the "vessel is ready to discharge, or otherwise they will be "landed and stored at the sole expense and risk of the "consignee, in the warehouse provided for that purpose, "or in the public store, as the collector of the port of "Liverpool shall direct, etc."

On the margin of the bill is the receipt for the freight to Liverpool. The appellant says (1), that this document is by its terms a through bill to Genoa; and (2) if not, the respondents treated it as such and assumed obligations which render them responsible to the same extent as if it had been a through bill.

The Court is of opinion that this was not intended for a through bill to Genoa, the vessel was bound for Liverpool, the freight to Liverpool was prepaid and was separate and distinct from the freight from Liverpool to Genoa, which was to be paid by the consignee there. It is not proved that respondents had vessels running from

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Liverpool to Genoa, or any running arrangements with or control over any other line trading between these ports, or that they would derive any benefit whatever by assuming the additional responsibility.

As is quite usual with these kind of documents this one is not clearly expressed. It is stated that delivery is to be made at the port of Liverpool (the word Liverpool being in writing) where the ship's responsibility shall cease, and provision is made for warehousing the goods there if not called for; while at the same time in the space left for inserting the name of the consignee are written in the words "unto order Genoa or its assigns." The goods were as the bill of lading read to be delivered at the port of Liverpool unto order Genoa or its assigns. We have to give a reasonable interpretation and meaning to the document, and make it consistent with itself and with the intention of the parties. I think the proper interpretation to be given to the contract is that the respondents would carry the goods to Liverpool, subject to order for Genoa. There is no doubt the ultimate destination of the goods, as respondents had reason to know, was Genoa, and looking at the bill and at the facts proved we think it is quite evident that what the respondents undertook to do was to convey the goods to Liverpool, and to forward them from there by other carriers to Genoa, and that with respect to the forwarding of the goods the respondents merely acted as the agents of the shipper. As carriers the respondents' responsibility ceased at Liverpool—and whatever further responsibility they incurred was as agents of the shippers to forward the goods.

I think the appellant's letter to the respondents of date 17th Nov., 1885, is fairly open to the interpretation that he must have understood the transaction in this way. Referring to the delay in forwarding the goods from Liverpool, he says: "Can you give me an explanation of "this detention, and how caused, from the agents of your "line not forwarding these lots of goods by the Genoa "S.S. as agreed on. My bills are being protested in con-

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"sequence of this irregularity, and causing me a good "deal of trouble and expense as well as damage. Can "you give me the address of *the agents of the Genoa line of* "*S.S. Liverpool.*"

Previous to this the Bank of B. N. A. at London, then holders of the bill of lading, had written to the respondents' agents at Liverpool: "I shall be glad to know if "you have instructions to forward the shipment to "Genoa."

It is plain that the parties interested, the shipper and the transferees of the bill, all understood that as respects the voyage from Liverpool to Genoa the respondents were mere forwarding agents.

The Lake Nepigon arrived at Liverpool on the 21st October, and there seems to have been some perhaps unnecessary delay at that place. Mr. Thom, the company's freight agent, had written to the company's agent at Liverpool on the 9th Oct., 1885:—

"Upon the Nepigon there goes out a shipment of 112 "bags asbestos, and the B. L. reads that it is to be *for-* "*warded* to Genoa. We have a letter from Mr. Thorpe, "agent for Mr. W. H. Jeffrey, stating that the shipment "*should be forwarded to Devalle, Pelli & Co.*, Torino, Italy. "Until we hear further from Mr. Jeffrey you had better "hold the shipment and I will advise you the correct "destination. I believe there are some of the bags (20) "not marked, will you please have them marked the same "as the others."

The respondent's agent at Liverpool held the goods there till the 30th October when he received the letter from the Bank of B. N. A., already alluded to which was to this effect:—

"With reference to the enclosed bill of lading for a "shipment of 112 bags asbestos per "Lake Nepigon," I "shall be glad to know if you have instructions to for- "ward the shipments to Genoa? The consignees are "Messrs. Devalle, Pelli & Co., of Torino, and according "to the wording of the bill of lading, the freight from "Liverpool to Genoa should be paid by them."

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As already stated, the Bank was the holder of the bill of lading, it having been transferred to them by appellant at Montreal to cover a draft drawn against it by appellant upon Devalle, Pelli & Co. The respondents after receiving this letter from the Bank forwarded the goods to Genoa by steamer "Persian" of the "Leyland Line" which was a regular and first class line, and returned to the Bank the Beaver Line bill of lading, which had been enclosed in the letter just referred to. Of course a new bill of lading was taken from the "Leyland Line," which was dated 3rd Nov. 1885, by which that company undertook to convey the goods to Genoa and to deliver them to Messrs. Devalle, Pelli & Co. or assigns, but in order to protect the Bank as holder of the first bill of lading and enable it to secure acceptance of the draft drawn against it before the delivery of the goods the following express condition was inserted in the margin: "Deliver only in "exchange for B. Ldg. issued by Beaver Line, Montreal "to Liverpool." The new bill of lading was sent to the consignees Messrs. Devalle, Pelli & Co., but of course it did not give them the control of the goods, but would enable them to get the Beaver Bill upon accepting the draft. It appears by the correspondence that the Bank forwarded this bill and the draft to their agents at Genoa, but the Leyland Line by some mistake of their clerk delivered the goods to the wrong person without requiring the production of this bill. The draft never having been accepted and the goods lost to appellant he has had to refund the Bank and now claims against the respondents. The Court is however of opinion that he has no action against them—they merely undertook to forward the goods from Liverpool, and they did so in a proper manner and with proper precautions. It is no fault of theirs if the goods were wrongly delivered, for such delivery was against their positive and written instructions — which required the production of the Beaver Line bill.

We think the judgment which dismissed appellant's

action should be confirmed, and it is confirmed with costs of both courts.

Judgment confirmed.

Greenshields, Guerin & Greenshields for appellant.
Selkirk Cross for respondents.

(J. K.)

May 23, 1890.

Coram DORION, C J., TESSIER, BABY, CHURCH, BOSSÉ, JJ.

THE EXCHANGE BANK OF CANADA,
(*Defendant in Court below*),
APPELLANT;

AND

JAMES FLETCHER,
(*Plaintiff in Court below*),
RESPONDENT.

Bank—Advance made upon security of shares of another Bank —Obligation to return shares on repayment of advance.

HELD:—(DORION, C. J., and CHURCH, J., *diss*) Where in order to evade the law prohibiting the acceptance by one Bank of the stock of another Bank as security for a loan (46 Vict., ch. 45, s. 2), an advance was made by a Bank and stock of another Bank was transferred as security to the cashier of the lending Bank, and the transaction was duly noted in the books of the Bank, that the owner of the shares so transferred was entitled to reclaim them from the Bank, or to get their value, when the debt was paid for the security of which the shares were transferred as aforesaid. The prohibition of the law applies to the Bank and not to the borrower.

APPEAL from a judgment of the Superior Court, Montreal (JETTÉ, J.), June 30, 1887, in the following terms:—

"La Cour, etc.....

"Attendu que le demandeur, propriétaire en vertu d'un transport à lui fait par John Fletcher, son père, de cent actions du fonds capital de la Banque des Marchands du Canada, se pourvoit contre la Banque défenderesse et

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Greene, un de ses directeurs, réclamant d'eux solidairement la remise des dites cent actions, du chiffre de $100 chacúne, mais d'une valeur de $120, formant une somme totale de $12,000, lesquelles actions sont en la possession des défendeurs, comme il sera ci-après relaté, et demande une condamnation personnelle au chiffre susdit contre les défendeurs, à défaut de la remise des dites actions;

"Attendu que le demandeur allègue au soutien de sa réclamation qu'en janvier 1880, ayant demandé à la Banque défenderesse de lui ouvrir un crédit de $20,000, celle-ci y consentit, mais que pour assurer ses avances elle exigea du demandeur par l'entremise de son caissier, le transport comme sûreté collatérale, des dites cent actions de la Banque des Marchands, avec entente que ses actions lui seraient remises aussitôt que le demandeur se serait acquitté en entier envers la défenderesse; que comme ce transport n'était pas autorisé par la loi, la défenderesse eut recours à un moyen détourné pour s'en assurer le bénéfice, et le fit, à cette fin, accepter par son caissier en son nom personnel; que plus tard, en avril 1883, la défenderesse disposa frauduleusement de ces actions en les transportant à l'autre défendeur Greene, qui les accepta, sachant qu'elles n'étaient qu'engagées à la Banque défenderesse et non sa propriété, et qui en disposa ensuite pour ses propres affaires, en sorte que le demandeur, qui a maintenant payé tout ce qu'il devait à la défenderesse, est fondé à se pourvoir contre elle et le dit Greene;

"Attendu que la Banque conteste, disant en substance:

"1o. Que ces actions ne lui ont pas été transportées: qu'elles ne pouvaient pas lui être cédées légalement et qu'elle ne les a jamais eues.

"2o. Que les actions en question étaient au nom de John Fletcher qui les a transportées directement et légalement à Geo. W. Craig, et que le demandeur n'en a jamais été propriétaire, le prétendu transport invoqué par le demandeur lui ayant été fait sur initiales, en marge du livre de la Banque, et étant par suite irrégulier, et de

nulle valeur; et que la défenderesse n'a retiré aucun profit de ces actions et n'en peut être responsable;

"Attendu que Greene à son tour soutient:

"1o. Que si Craig, caissier de la Banque défenderesse a accepté le transport de ces actions pour la Banque, il a fait un acte illégal, qu'il n'avait pas pouvoir de faire, et qui ne peut, par suite, engager la responsabilité du dit défendeur Greene, comme directeur de la dite Banque;

"Que d'ailleurs lui, Greene, n'a jamais eu ces actions; qu'il est vrai que le 6 avril 1883, Craig pour le garantir d'un cautionnement de $72,000 qu'il avait souscrit pour lui, conjointement avec Geo. W. Craig, a transporté à ce dernier et au défendeur, entre autres valeurs, cent actions de la dite Banque des Marchands qui ont été transportées le même jour à la Banque d'Epargnes, créancier de la somme cautionnée par le défendeur et que cette dernière Banque en a disposé ensuite elle-même pour son remboursement, mais que le défendeur ne savait pas alors que ses actions fussent celles du demandeur et l'ignore encore aujourd'hui, ces actions lors du transport au défendeur étant inscrites au nom personnel de Craig dans les livres de la dite Banque des Marchands, et ayant par suite été valablement aliénées en faveur du défendeur, sans fraude de la part de ce dernier;

"2o. Que d'ailleurs le transport sur lequel le demandeur s'appuie est nul et de nulle valeur en droit, n'étant fait que sur initiales et non en la forme réglée par la loi;

"Adjugeant d'abord sur la contestation de la Banque défenderesse;

"Considérant que bien que lors du transport des dites actions au demandeur la loi n'autorisât plus depuis deux mois seulement, l'acceptation de telles garanties par une banque, telle cession jusque-là permise n'était cependant pas prohibée à peine de nullité; qu'en outre il appert en preuve que le demandeur a été induit par le caissier à lui faire le transport demandé en son nom personnel, mais pour l'avantage de la Banque; que le caractère de garantie collatérale de ce transport, en faveur de la Banque, est constaté par écrit du caissier, pièce 'G' du deman-

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deur ; qu'il en a été pris note dans les mêmes termes dans les livres de la dite Banque, en tête du comte ouvert au demandeur où mention a été faite que les avances au demandeur étaient garanties par le transport de ces actions : que cette mention a été ainsi entrée aux livres par le commis à ce préposé, sur production de la dite pièce "G" du demandeur et sur l'ordre régulier du caissier, que ce même caissier est ensuite, savoir, vers 1882, devenu président et gérant de la Banque défenderesse, qu'il avait encore alors, en son nom les actions à lui transportées comme susdit, et que par suite la Banque elle-même les possédait et se trouvait liée par cette possession en son nom et pour son profit par son dit président ; que la dite Banque a d'ailleurs ratifié ensuite l'acte de son caissier, et reconnu à diverses reprises être en possession des dites actions à titre de garantie, en percevant les dividendes semi-annuels payés sur icelles et les portant ensuite au crédit du demandeur, dans ses propres livres ; que le dit président ne s'est dénanti de ces actions que plus tard, savoir, en avril 1883, alors qu'à raison des actes susdits la responsabilité de la Banque défenderesse se trouvait pleinement engagée envers le demandeur pour la restitution d'icelles, et que l'illégalité initiale du transport ne saurait affecter le fait de la possession des dites actions par la défenderesse, sa connaissance légale de leur détention dans son intérêt, sa ratification de l'acte de son caissier à l'égard d'icelles et par suite son obligation de les restituer au demandeur ;

"Considérant que le transport par initiales en marge du livre de la Banque des Marchands par John Fletcher au demandeur et par ce dernier à Geo. W. Craig, qui les a ensuite transportées à Thomas Craig, a eu l'effet de mettre les dites actions en la possession du caissier de la défenderesse comme susdit et est, par suite, parfaitement suffisant pour les fins de la demande ;

"Considérant que dans ces circonstances le transport des dites actions à Greene par Craig, président de la Banque, en son nom et pour son profit personnel, lorsqu'il les détenait et possédait au nom et pour le bénéfice de la

dite Banque et sujettes à l'obligation de celle-ci, de les rendre au demandeur, constitue envers ce dernier une fraude dont la défenderesse est responsable ;

" Considérant qu'il est admis en fait que le demandeur a remboursé à la défenderesse tout ce que celle-ci lui avait avancé et que par suite il est fondé à lui demander la restitution de ces dites actions ;

" Considérant qu'il est prouvé que la balance de ces actions est de $110 chacune, ce qui forme une valeur totale de $11,000 ;

" Renvoie les exceptions et défenses de la dite Banque défenderesse et la condamne à rendre et remettre au demandeur, par transport légalement fait, sous quinze jours du prononcé du présent jugement les dites cent actions de la Banque des Marchands, appartenant au demandeur comme susdit, et à défaut de ce faire dans ce délai, condamne la défenderesse purement et simplement à payer au demandeur la dite somme de $11,000 valeur des dites actions, avec intérêt sur icelle à compter du 8 février 1884, date de l'assignation, et les dépens, distraits, etc.

" Et adjugeant maintenant sur la contestation du défendeur Greene :

" Considérant qu'il n'est pas prouvé que le dit Greene ait eu connaissance du transport susmentionné par le demandeur à Craig, qu'il ne paraît pas que Craig ait communiqué ce fait ni à Greene ni aux autres directeurs et que bien qu'il a dans l'espèce, pu lier la Banque en sa qualité de président et par la connaissance par lui acquise et les faits par lui accomplis en cette qualité, il n'a pu engager en même temps la responsabilité des directeurs à qui ces faits ont été cachés ; que ce transport n'était pas d'ailleurs, dans les circonstances, un de ces actes que les directeurs sont légalement supposés de connaître ; que de plus le demandeur doit, quant au dit Greene, s'imputer à lui-même l'imprudence d'avoir mis ses dites actions au nom personnel de Craig et permis ainsi à ce dernier d'en disposer pour son propre intérêt ; que la cession des dites actions par Craig à Greene a été acceptée par ce dernier, de bonne foi, pour se garantir d'une responsabilité consi-

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dérable par lui prise pour rendre un service gratuit, et qu'il appert que loin d'en avoir profité il y a perdu ; que dans ces circonstances Greene ne peut être tenu responsable de la fraude de Craig et de l'imprudence du demandeur ;

" Maintient la première exception du dit Greene et renvoie et déboute l'action du demandeur quant à lui avec dépens, distraits, etc."

Nov. 19, 20, 25, 1889.]

Macmaster, Q. C., Trenholme, Q. C., and *A. B. Major* for appellant :—

Briefly stated the facts are these :

James Fletcher had an account with the Exchange Bank and asked for further advances. The cashier of the Bank, Mr. Thomas Craig asked him for collateral security to secure the advances. Fletcher could give no collateral security except one hundred shares of stock of the Merchants Bank of Canada. The stock of a Bank cannot be accepted by another bank as collateral security for the making of an advance. Craig explained this to Fletcher, and after it was so explained to Fletcher, the latter transferred the one hundred shares of stock—not to the Exchange Bank, and not to the cashier of the Bank—but to George W. Craig a brother of the cashier, who at that time was the manager of a Building Society in Montreal, and who never had any office in connection with the Exchange Bank. George W. Craig held the one hundred shares of stock in his own name and subject to his own control. Some time afterwards George W. Craig transferred the stock to Thomas Craig. Later Thomas Craig re-transferred the stock to George W. Craig, and George W. Craig transferred the stock to the City and District Savings Bank, to secure a loan made by the latter Bank to Thomas Craig.

The Exchange Bank never held the Merchants Bank stock, and never received the benefit of it. Fletcher, with the full knowledge of the law prohibiting the acceptance by one Bank of the stock of another to secure an advance

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made by a Bank, allowed his stock to go into the hands of an irresponsible party, who parted with it without his knowledge and without the knowledge of the Exchange Bank. Fletcher subsequently repaid the advances made by the Exchange Bank to him, and then demanded from the Exchange Bank the restoration of the one hundred shares of stock. The Bank pleaded that they did not hold, never held, and could not hold the stock; that they were not bound to account to him for it; that by law they could not legally hold the shares of stock of another Bank, and that if he knowingly entered into an improvident bargain against the express terms of the Banking Act, he must look to the persons with whom he was dealing and not to the Exchange Bank.

The taking of the stock of another Bank to secure an advance was not in the usual course of the business of the Exchange Bank, and in fact was in direct violation of the spirit of the Banking laws.

This case is easily distinguished from that of one, in which the manager of the Bank acted in excess of his powers, or deceived the complainant and the Bank afterwards adopted his act, and derived the benefit from his deceit or misconduct.

It does not fall within the numerous class of cases in that category. Had the Bank so acted, it would undoubtedly have been liable and bound to restore the stock.

If Fletcher had been deceived; if he had transferred his stock to Craig the cashier without the knowledge that it was against the Banking Act so to do; and had Craig, knowing that it was in violation of the law to make such transfer, deceived the plaintiff by not disclosing the illegality of the transaction, then the action might lie. But the facts are at variance with the proposition last put.

F. X. Archambault, Q. C., and *Lacoste*, Q. C., for the respondent:—

L'appelante n'a fait aucune preuve et s'est contentée de

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ses défenses pour repousser la demande de l'intimé et sa responsabilité dans l'espèce, prétendant qu'elle n'est pas liée par les actes de son caissier, qui a outrepassé ses pouvoirs et a agi *ultra vires* en acceptant ces parts de la Banque des Marchands, sans son autorisation et contrairement à la loi, l'acte des banques, qui le défend, et en disant aussi que ces parts ont été transportées à Craig personnellement.

Toute la cause, suivant nous, peut donc se résumer dans les questions suivantes qui se soulèvent dans l'espèce, savoir :

1o. L'intimé a-t-il prouvé les allégués de son action, et la transaction par lui faite avec la banque, par l'entremise de son caissier et gérant, Craig, est-elle légale et se trouve-t-elle à lier la banque ?

2o. En agissant comme il l'a fait avec James Fletcher, l'intimé Craig a-t-il agi dans les limites de son mandat ou *ultra vires ?*

3o. La transaction et les parts de l'intimé dans la Banque des Marchands, transportées comme ci-dessus, ont-elles profité à l'appelante qui s'en est servie pour payer ses dettes, et peut-elle ainsi s'enrichir aux dépens d'autrui ?

4o. L'intimé était-il propriétaire des parts en question, pouvait-il poursuivre lui-même, comme il l'a fait, et l'appelante a-t-elle intérêt à soulever cette question ?

L'objet principal d'une banque, sa principale opération, consiste à faire, moyennant une rémunération appelée *escompte*, des avances d'argent à une personne sur la garantie de son propre crédit ou sur la garantie de certains effets donnés en nantissement.

Voilà ce qui se passe tous les jours à ses comptoirs. Et l'officier d'une banque, son gérant par exemple, n'a pas d'autre mission que celle de veiller à ce que chaque avance faite par la banque soit bien garantie.

C'est ce qui est arrivé dans notre cas. Le demandeur intimé s'est un jour présenté aux comptoirs de l'appelante pour ouvrir un crédit ; il s'adresse au gérant, Craig, la proposition est faite, acceptée, mais à la condition d'une garantie de la part de l'intimé. Cette garantie, l'intimé

la donne aussitôt en transférant à la Banque appelante 100 capital-actions de la Banque des Marchands.

Rien d'extraordinaire dans cette transaction ; cependant, après plusieurs années, on vient, non pas la banque, qu'on le remarque bien, on vient discuter la compétence de Craig à faire de semblables actes ; ne serait-ce pas plutôt l'omission des mesures prises par Craig, qui constituerait de sa part excès de pouvoir ?

Un auteur d'une grande autorité, a posé la règle qui doit gouverner en ces cas :

"Ce qu'il est important de remarquer, et ce qui doit "être perpétuellement la base des décisions lorsqu'il s'é- "lève quelque doute sur la légitimité de ce qu'a fait un "associé gérant, non seulement avec les tiers, mais encore "entre les autres associés et les tiers, c'est le point de "savoir si ce qu'il a fait est un objet d'administration." 4 Pardessus, Dr. Com. n. 1014.

Or, rien de plus évident que, pour un gérant, c'est un acte de son administration que d'exiger, à sa discrétion, et de recevoir des effets donnés en nantissement de l'argent qu'il prête au nom de la Banque.

Et c'est ce qui est arrivé dans l'espèce.

"The cashier of a bank is *virtute officii* generally intrusted with the notes, securities and other funds of the bank, and is held out to the world by the bank as its general agent in the negociation, management, and disposal of them. *Prima facie*, therefore, he must be deemed to have authority to transfer and indorse negociable securities, held by the bank, for its use and in its behalf. No special authority for this purpose is necessary to be proved. If any bank choose to depart from this general course of business, it is certainly at liberty to do so ; but in such case, it is incumbent on the bank to show that it has interposed a restriction, and that such restriction is known to those with whom it is in the habit of doing business." Brice, *Ultra vires*, 618.

Il a même été décidé : "Qu'un caissier de banque peut poursuivre en son nom pour le paiement d'une somme due à cette banque." *Ferrie & Thompson*, 2 R. de L. 303.

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Une autre espèce a fait l'application de la même règle : "Qu'en loi et suivant les usages du commerce, l'acceptation d'un chèque ou d'un autre effet de commerce par un gérant de banque, avec la condition d'en effectuer le paiement à une date subséquente, est légale et dans les limites des pouvoirs d'un tel gérant." *Banque du Peuple & Banque d'Echange*, M. L. R., 1 S. C. 231.

Bien plus, chaque fois qu'un particulier entre en négociation avec l'agent d'un établissement commercial, il y a présomption que cet agent avait l'autorisation nécessaire à cette fin :

"Les divers agents, connus sous les dénominations que "nous avons indiquées n. 531 (facteurs, commis, servi- "teurs), et quelque fois les femmes des commerçants ou le "mari d'une femme commerçante, sont présumés sous "certains rapports être fondés de leurs pouvoirs. L'é- "tendue et la durée en sont déterminées, soit par le genre "d'occupations habituelles de ces agents, et de ce qu'ils "ont déjà fait sans opposition ou avec l'approbation du "préposant, soit d'après ce qu'il est d'usage de confier à "ceux qui ont de semblables emplois. Ainsi le facteur "préposé en termes généraux à un établissement com- "mercial, est autorisé à faire tout ce que rend nécessaire "la direction qui lui est confiée ; et si celui qui l'emploie "prétend y avoir apposé certaines limitations, il doit prou- "ver que le tiers qui a traité avec le facteur, les a con- "nues." Pardessus, Dr. comm. no. 561.

Mais, dira-t-on, Craig a manifestement excédé ses pouvoirs en acceptant pour la Banque une garantie sur les actions d'une autre banque, et la présomption de compétence qui existe quant aux actes ordinaires d'un agent vis-à-vis son principal ne peut s'appliquer dans l'espèce, comme celle-ci, d'une transaction prohibée par la loi.

Mais les auteurs et notre jurisprudence sont d'accord sur ce point qu'une telle transaction n'est pas au-delà des pouvoirs exprès ou implicites d'un gérant, et qu'une telle transaction oblige la Banque :

"An agent has authority, express or implied, to do a "particular act—the entering into a contract, the making

"of a representation or otherwise — he has incidental "thereto authority to do all such things and acts as are "ordinarily done by principals themselves, or by the "agents of private persons, in and about analogous acts, "including the commission of frauds and other torts, and "the corporation will be bound thereby,—unless it can "be shown either that the tort was the personal affair of "the agent or that the other party had knowledge at the "commission of the tort of the exact authority of the "agent." Brice, *Ultra vires*, c. lxx, p. 464.

Et bien plus explicite est le passage suivant:

"Though a corporation take in pledge security which "it is prohibited by its charter from holding (as shares of "another corporation) the contract of pledge is not void, "but, at most, only avoidable. The title to the security "rests in the corporation as pledged." Jones, On Pledge, § 76.

Jugé: "That a bank may lawfully make advances "under the Banking Act, 34 Vic., ch. 5, on the security "of shares in an incorporated trading company, and sell "such shares in default of the repayment of the advan-"ces." *Geddes* v. *La Banque du Peuple*, 24 L. C. J. 135—Papineau, J.

Morse, on Banking, p. xxxviii.

Bank of Montreal v. *Geddes*, 3 Leg. News, 146—Johnson, J.

"Corporations are bound by the acts of their agents in "the same way and to the same extent as persons are." *Ferrie & The Warden of the House of Trinity*, 1 R. de L., 27.

May 23, 1890.]

DORION, Ch. J. (*diss.*):—

The respondent Fletcher, who was plaintiff in the Court below, sued the Exchange Bank of Canada, asking for the return to him of one hundred shares of Merchants Bank stock which he pretended he had transferred to the Exchange Bank as security for a loan. This loan had been repaid by the respondent, and he claimed that he was entitled to a return of the stock, or to get its value.

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The Bank pleaded that it had never derived any advantage from these shares; that there had never been a proper transfer from John Fletcher the father, the original owner, to James Fletcher the son (the respondent). Greene, who was sued jointly and severally with the Bank, pleaded that he had no knowledge of the transaction; that he got the shares from Craig for valuable consideration, not knowing anything of the transaction by which Craig obtained the shares. By the judgment of the Court below the Exchange Bank was condemned to return the shares or to pay the value. Greene was exonerated, and the action was dismissed as to him. The Exchange Bank now appeals from the judgment which condemned it to return the shares.

The facts are these. In 1880 Fletcher wanted accommodation from the Bank. He went to Craig, the cashier, who asked what security he could give. Fletcher offered to transfer one hundred shares of Merchants Bank stock. By an Act passed in 1879 the Banking Act had been amended, and Banks were prohibited from making advances upon the stock of other Banks. Before that date they could make advances upon the stock of other Banks; but in 1880, when this advance was made, the Exchange Bank was no longer in a position to make an advance upon the stock of other Banks. Craig explained to Fletcher that the Bank could not legally take a transfer of the shares offered; but he added that if the shares were transferred to him, or to some one else on behalf of the Bank, he would make the loan. The transfer was made to G. W. Craig, a brother of Thomas Craig, the cashier. When Fletcher repaid the advance the Bank had become insolvent, and refused to recognize the transaction or return the hundred shares. In the meantime the shares had been transferred through several hands, and had disappeared.

The question is whether the Bank is responsible for the act of Craig. At the time, one of the accountants of the Bank was instructed to place at the head of Fletcher's account the words "advance secured by one hundred

shares of Merchants Bank." This is the only evidence to show that Craig knew the advance was made on the security of the hundred shares. The Bank pleads that this was an entirely illegal transaction; that the Bank never had any profit from the shares, and was not responsible.

It is evident that the Exchange Bank never had in its own name any title to the shares. Fletcher trusted Craig. It seems to me that he has no recourse except against Craig. It is a hard case for the plaintiff that he should have to lose these $11,000, when he was induced by the principal officer of the Bank to make the transaction; but there is no evidence that the Bank ever profited to the extent of one cent by the transaction. I do not attach any importance to the objection that James Fletcher never became proprietor of the shares by a transfer in the bank books. But I differ from the judgment about to be rendered, on the first ground, viz.. that the Bank never profited by the transaction, and that it was an illegal transaction. Upon that ground I would reverse the judgment, but I am in the minority.

CHURCH, J., who was not present when the judgment was rendered, also dissented.

TESSIER, J. (for the majority of the Court):—

It was noted in the books of the Bank that the advance was made on the security of the shares. Craig may have been lacking in judgment, but he was president and cashier of the Bank, and had power to bind the Bank. The cashier is held out to the world as the agent of the Bank, and his acts are binding.

Then the question comes up whether the law which prohibited advances upon stock of other Banks prevents such a transaction from having effect. Is such a prohibition a matter of *ordre public?* I consider that the prohibition of the law applies to the Bank only, and not to those who give the collateral security by stock of other Banks. The nullity does not affect Fletcher at all. He did not commit any offence against the law. The judg-

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ment pronounces against the Bank because it is managed by its officers, and is responsible for their acts. The judgment of the Court below is carefully drawn, and the majority of this Court adopts the reasons therein given, and it is affirmed.

Judgment confirmed.

Macmaster, Hutchinson & Maclennan for appellant.
Archambault & Pelissier for respondent.

(J. K.)

March 20, 1890.

Coram DORION, CH. J., CROSS, BABY, BOSSÉ, JJ.

BENJAMIN PRATT,
(*Plaintiff in Court below*),
APPELLANT;

AND

ISAIE CHARBONNEAU ET AL.,
(*Defendants in Court below*),
RESPONDENTS.

Violation of Domicile—Municipal Corporation—Arrest without warrant—Damages.

HELD:—1. That officers of police in the employment of a municipal corporation have no right to enter the dwelling of a citizen in the night time, without a warrant, and arrest him on mere suspicion that a felony has been committed; and the corporation will be held responsible in damages for such illegal arrest.

2. Where the damages have been appraised by the Court of first instance, and the Court of Review has reduced the amount, the Court of Appeal will not interfere with the award of the intermediate Court, unless it appears that gross injustice has been done.

APPEAL from a judgment of the Court of Review, Montreal, June 30, 1888, which reformed a judgment of the Superior Court, Montreal, as to the amount of damages.

The judgment of the Superior Court, (TAIT, J.), Feb. 29, 1888, was as follows:—

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"The Court having heard the parties by their counsel respectively upon the merits of this case, examined the proceedings and proof of record, heard the witnesses of the said parties *viva voce* in open Court, and deliberated:

"Considering that plaintiff has proved the material allegations of his declaration, and particularly that the defendant Charbonneau, without warrant and without reasonable and probable cause, arrested the plaintiff and his wife on the 8th day of July last, about three of the clock in the morning, and caused them to be kept under arrest and imprisoned until the 12th day of said July;

"And considering that defendants have failed to prove the material allegations of their plea, and particularly have failed to justify the conduct of said defendant Charbonneau, in making said arrest, and in causing plaintiff and his wife to be detained under arrest and imprisoned as aforesaid;

"Considering that defendants, the City of Montreal, have pleaded jointly with said defendant Charbonneau and made common cause with him, and are responsible jointly and severally with him for the damages suffered by the plaintiff;

"Considering that the plaintiff was occasioned damages by reason of said arrest and imprisonment, which the Court assesses at the sum of $250;

"Doth adjudge and condemn the said defendants, jointly and severally, to pay to said plaintiff the said sum of $250 with interest thereon from this day, and costs *distraits*, etc."

The judgment in Review, JETTÉ, TASCHEREAU, LORANGER, JJ., reforming the above judgment, was as follows:—

"La cour après avoir entendu les parties par leurs avocats respectifs sur la demande des défendeurs pour faire réviser le jugement rendu en cette cause par la Cour Supérieure, siégeant dans et pour le district de Montréal, le 29e jour de février dernier (1888), et après avoir examiné le dossier et la procédure et mûrement délibéré;

"Considérant que dans les circonstances établies au cours de l'enquête, les dommages accordés au demandeur

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sont excessifs et qu'il y a lieu de réformer le jugement *a quo* quant au *quantum* de la condamnation ;

"Considérant qu'il y a à cet égard erreur dans le dit jugement ;

"Casse et annule le dit jugement du 29 février 1888, et procédant à rendre celui que la dite Cour Supérieure aurait dû rendre, condamne les défendeurs conjointement et solidairement à payer au demandeur, la somme de $25, avec intérêt de ce jour et les dépens d'une action de $50 à la Cour de Circuit, distraits, etc., et avec dépens de cette Cour de Révision contre le demandeur, distraits, etc."

(L'Honorable Juge Jetté ne concourt pas à ce jugement.)

Jan. 16, 17, 1890.

Trenholme, Q.C., and *Geoffrion*, Q.C., for appellant :—

The facts of the case are as follows :

On the 8th July, 1887, some time between the hours of 1 and 2 o'clock at night, the respondent Charbonneau, who is a sergeant of the police force of the city of Montreal, the other respondent, accompanied by several constables, who were under his charge and control, entered the dwelling of appellant, in the city of Montreal without a warrant or other authority, while all the family, including appellant, were asleep, and arrested appellant, and his wife and son, taking them first to the Chaboillez Square Police Station, and from there to the Central Police Station, in an open waggon, exposed to public view, and with the appellant and his son handcuffed, taking at the same time a large quantity of goods belonging to the family, on the pretext that they were stolen.

On arriving at the Central Station, Charbonneau laid an information against appellant, and then required that he, with the other two members of his family, who were arrested, be remanded to the common jail for eight days, until he could find the owner of the goods, alleged to have been stolen. Appellant, and the other members of his family who were arrested with him, were thereupon sent to the common jail, where they remained from the 8th July until the 12th, when they were liberated, and

told to go home, without the formality of a trial, the goods, or most of them, having been identified as their own property, by Hewitt, the auctioneer, who had sold most of them, and nothing whatever being found which could be charged against them.

The appellant brought the present action to recover damages for false arrest against the respondent Charbonneau, and against the city of Montreal, as being liable for the acts of its policemen.

The city attorney appeared without any reservation, and pleaded generally for both respondents, the plea being that the respondent Charbonneau had probable cause for, and was justified in, making the said arrests, as he did, and in effect still claiming that the goods were stolen.

The case was heard by Tait, J., the witnesses being examined before him in open Court, and by the judgment, the respondents were condemned jointly and severally to pay the appellant the sum of $250 damages with interest and costs.

From this judgment the respondents inscribed in Review where the majority of the Court reformed the judgment of the lower court, condemning the respondents jointly and severally to pay appellant the sum of $25 as damages, with costs as of an action for $50 in the Circuit Court, and with costs in the Court of Review against appellant.

Before discussing the question at issue, it is necessary to explain the circumstances of appellant's family.

Mrs. Pratt, appellant's wife, was in the habit of frequenting auction sales, at which she bought large quantities of odds and ends of every kind, which she afterwards sold, going about from house to house for that purpose, all of which was well and generally known. She appears to have had a large stock of goods of various kinds on hand at the time of the arrest. the greater part of which were seized and taken away by respondent Charbonneau at the time the arrest was made.

The appellant and his son were honest, hard-working

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men, as proved by the evidence of a large number of witnesses, of the highest character and credibility.

The circumstances of the family at the time of the arrest are accounted for by the fact that the work in which appellant and his son were engaged was interrupted during winter, and was in some measure at all times of a precarious nature.

There can be no dispute as to the facts of the case, nor as to the right of appellant to recover damages from respondents, as it is clearly established, even by the judgment of the Court of Review, now appealed from, and the only questions at issue are:—

1. Was the amount awarded by the Court below excessive?

2. Was the Court of Review justified in disturbing the judgment of that Court?

On the first point, appellant submits, that not only does the evidence adduced at the trial fully justify the amount of damages awarded, viz: $250, but it would have amply sustained a condemnation for a much larger amount. The circumstances attending the arrest were of a most aggravated nature, and should be taken into account in estimating the damages which should be awarded appellant. The respondent Charbonneau, with four policemen, entered appellant's dwelling between the hours of one and two o'clock at night, when all the family were in bed, without a warrant or any authorization, and called upon them to explain how they had obtained possession of certain articles, which were in the premises, and on their failing to produce receipts, shewing that the goods had been purchased (which they were in reality prevented from doing by respondent Charbonneau and his men, and which receipts are filed of record in this cause) he arrested the appellant together with his wife and son and took them first to the Chaboillez Station, and from there to the Central Police Station, whence they were sent to jail as stated.

The respondents have produced no evidence whatever which can be held to sustain their plea of justification.

The pretended grounds which they invoke as to large quantities of goods being brought into the house, in a suspicious manner, are completely rebutted.

It appears from Charbonneau's evidence, that he had all the information that was given him, about 4 p. m. on the 7th of July, the day before he made the arrest, so that he had ample time to verify the information and to obtain a warrant, if there was ground for it.

On this point the Court is referred to the following authorities:—

In the case of *Allan* v. *Wright*, 8 C. & P., p. 522, which was very similar to the present case, it was held:—

"That as the defendant had taken the law into his own "hands, and not adopted as a prudent person would, "under such circumstances, the cautious course of having "a previous investigation by a magistrate, and of obtain- "ing a warrant from him, it was incumbent on him to "make out to the entire satisfaction of the jury not "only that a felony had been committed, but that the "circumstances of the case were such that they or any "reasonable person acting without passion or prejudice, "would fairly have suspected the plaintiff of being the "person who had committed it."

Addison on Torts, Vol. 2, Woods ed., No. 853:—'If "circumstances of suspicion existed, which might have "been readily removed by proper inquiry, and no inquiry "at all was made, there is good evidence of want of a "reasonable and proper cause."

No. 876:—"If the defendant, instead of relying on the "plea of not guilty, elects to bring the facts before the Court in a plea of justification, he must allege as a "ground of defence, that the facts and circumstances "which he relies upon as being reasonable and probable "cause for the institution of the prosecution, *were known* "*to him at the time the charge was made and formed the main* "*inducement for his putting the law in motion.*"

Cooley on Torts, page 183—"The test of probable cause "is to be applied as of the time when the action com- "plained of was taken, and if upon the facts then known,

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"the party had no probable cause for action, *it will be no* "*protection to him, that facts came to his knowledge afterwards,* "that might have constituted a justification, had he been "aware of them."

Delegal v. *Highly*, 3 Bingham, N.C., page 950: Held:— "That a plea to an action for a malicious charge on the "ground that the plaintiff had committed the offence "imputed to him, is not sufficient unless it alleges that at "the time of the charge the defendant had been informed "of or knew the facts on which the charge was made."

It will be remarked that circumstances which might in the case of an ordinary arrest amount to a justification would in no way justify the conduct of the respondent Charbonneau in this case.

It is a principle of our law as well as that of England, France, and indeed of almost every civilized country, that only circumstances of the greatest urgency will justify a forcible entrance into the dwelling of any citizen, and particularly in the night.

In 2 Batbie, Traité de Droit Public et Administratif, p. 369 *et seq.*, speaking of the inviolability of the domicile we find the following principle laid down: "Quant aux cas "dans lesquels les agents de l'autorité peuvent s'introduire "dans les maisons de particuliers plusieurs distinctions "sont à faire. D'abord les droits de l'autorité sont "différents, *suivant que l'introduction a lieu pendant le jour ou* "*pendant la nuit.*"

"*La nuit, nul ne peut entrer qu'en cas d'incendie, inondation* "*ou de réclamation venant de l'intérieure.*"

"En dehors de ces cas, on ne peut que prendre des "mesures conservatoires et par exemple, cerner la maison jusqu'au jour."

Sec. 103, (page 378):—"En Angleterre les recherches "domiciliaires ne peuvent être faites qu'en vertu d'un "mandat de perquisition, (Search Warrant), et la loi laisse "au juge le soin d'apprécier dans quels cas il y a lieu à "les ordonner. L'endroit où la perquisition sera fait doit "être exactement déterminé, et l'on considérerait comme "illégaux les mandats qui ordonneraient les perquisitions

"dans toute l'étendue d'un district. Les visites domi-
"ciliaires ne peuvent être faites de *nuit* qu'en cas d'urgence
"et spécialement lorsqu'il s'agit de pénétrer dans des
"maisons suspectes. L'inviolabilité du domicile est
"poussée si loin en Angleterre, que l'on a pu dire de la
"maison du citoyen qu'elle était une véritable forte-
"resse."

In the Revised Statutes of Canada, Section 51, page 2013, we find the same principles set forth. It is there provided that "If a credible witness proves upon oath "before a Justice that there is reasonable cause to suspect "that any property whatsoever, on or with respect to "which any larceny or felony has been committed, is in "any dwelling house, &c., the Justice *may grant a warrant* "*to search such dwelling house, etc.*" Section 52 provides that "If any credible witness *proves upon oath before any* Justice "a reasonable cause to suspect that any person has in his "possession or on his premises any property whatsoever "on or with respect to which any offence, &c., has been "committed, the Justice may grant a warrant to search "for such property, as in the case of stolen goods."

The circumstances in which a house may be entered, namely, when a felony has been committed, and the officer is in hot pursuit, or where persons are fighting furiously in a house, etc., are also referred to and provision is made respecting them, in the instructions given as to the legal powers and duties of police constables, Municipal Laws, Montreal, 1865, page 492, Sections 15 and 16. In these sections, cases such as those referred to above are mentioned, but with the caution that;

"The breaking open of outer doors is so dangerous a "proceeding that the policemen should never resort to it "except in extreme cases, and when an immediate arrest "is necessary," and further it says, "Except in such cases "it is better in general that the constable should wait "until he has a warrant from a magistrate for the "purpose."

At Sec. 30 it is provided "A constable may enter a "house to search for stolen goods, *having got a search*

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"*warrant for that effect from a magistrate. He should if pos-*
"*sible execute it in the day-time.*"

In this case the respondent Charbonneau acted in direct violation of the above provisions, and the principles laid down in the above authorities.

There was no urgency, he had no charge of any kind against appellant or any member of his family, he had no warrant from a magistrate authorizing him to enter and search appellant's dwelling, but in the face of these facts he did enter it, further still he entered it in the night-time, and at an hour when he well knew it would subject appellant and his family to the greatest possible inconvenience and annoyance. Such a violation of the rights of the citizen is not only unjustifiable, but merits the severest penalty which the law allows, and would have amply justified a much larger condemnation than that awarded by the Court of first instance, while the amount awarded appellant by the Court of Review, being in fact little more than the amount of the average wages which appellant could have earned while he was actually under arrest, is so ridiculously inadequate as to amount in reality to an aggravation of the injury already suffered by appellant.

The appellant further contends that respondents by their pleas of justification aggravated the grievance complained of, especially in view of the fact that no offence whatever could be found to have been committed by the appellant and his family, as was well known to respondents when their pleas were filed. (*Warwick* v. *Foulkes*, 12 M. & W., 507).

We now come to the discussion of the second point at issue, namely, was the Court of Review justified in disturbing the judgment of the lower Court?

As already stated, the evidence was taken in open Court, and the Hon. Judge who presided in the Court of first instance was by reason of this fact in much the best position to appreciate the facts of the case, and the value of the evidence offered by the respective parties, and to estimate the damages which should be allowed.

This Court has decided repeatedly that in cases of this nature a judgment should not be disturbed by a Court of Appeal on a question of amount, unless it was clearly excessive, or violated some rule of the law.

The Supreme Court following the Privy Council in this respect, has laid down the doctrine still more absolutely. Thus in *Levi* v. *Reed*, 6 Can. S. C. R., p. 483, it was held:—

"In an action of damages if the amount awarded in the "Court of first instance is not such as to shock the sense "of justice, and to make it apparent that there was error "or partiality on the part of the Judge, the exercise of a "discretion on his part being in the nature of the case "required, an Appellate Court will not interfere with the "discretion such Judge has exercised in determining the "amount of damages." See also *Gingras & Desilets*, Dig. Supreme Court Repts. p. 116-18; *Lamkin & The South Eastern Railway Co.*, 5 Appeal Cases, 352; *Ball & Ray*, 30 Law Times, N. S. p. 1.

In the case of the *St. Lawrence Steam Navigation Company & Lemay*, Montreal Law Reports, 3 Q. B., page 214, it was held by this Court:—

"That where it is not a matter of contract, and no "question of law or principle is involved, and the case "resolves itself into a mere question of appreciation of "evidence, *e. g.*, as to the value of services, the Court of "Appeal will not disturb the judgment of the Court "below, unless a serious injustice has been done to the "appellant."

In the present case the only difference between the judgment of the Court of first instance and that appealed from is in the appreciation of the damages which should be allowed, and even on this point, owing to the dissent of the Hon. Mr. Justice Jetté in Review, the opinions of the judges who heard the case are equally divided.

If we apply the doctrine laid down by this Court in the case of *The St. Lawrence Steam Navigation Company & Lemay*, and other cases referred to, it will be found to apply most strongly, and on this principle, viz.: that on

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a mere question of the appreciation of evidence the Court of Appeal should not disturb the judgment of the lower Court, the judgment of the Court of first instance should be restored, and appellant respectfully asks that said judgment of the Court of first instance be restored with costs.

Ethier, Q.C., for the respondents :—

En loi, le sergent Charbonneau était justifiable d'arrêter *sans warrant* le demandeur et ses compagnons, tant sur ses propres soupçons que sur ceux d'autrui ; il ne pouvait, sans forfaire à son devoir, et même sans encourir les penalités que la loi décrète contre tout constable ou agent de police qui désobéit à quelque ordre légal, s'abstenir d'enjoindre au demandeur de rendre compte de sa conduite, parce qu'il y avait :

1o. Cause probable ;

2o. Raisons et circonstances suffisantes ;

3o. Soupçons plus que probables de la part du constable et de personnes dignes de foi ;

4o. Conduite étrange et inexplicable du demandeur et de ses compagnons ;

5o. Certitude que des félonies avaient été commises, et de graves soupçons planant sur la famille *Pratt*.

Enfin cette dernière a été trouvée en possession d'effets volés : ce qui en loi constitue une félonie.—Taschereau, Criminal Acts, vol. 1, p. 607, s. 100.

L'arrestation *sans warrant* peut être opérée sur soupçons probables, quand une félonie a été commise, et sur soupçons graves et probables qu'une félonie a été commise, quand même on ne peut prouver ensuite que telle félonie a été commise.

Cause prob.—Leg. News, vol. 9, p. 314, 1886.

Lanctot,—p. 90, 91, 99, 95.

Archbold,—1 vol., (116, notes 101, 102) p. 24 et note.

Woolrych,—p. 8.

Taschereau,—Crim. Acts, vol. 2, p. 15, 23.

Droit Criminel,—Arrestations, de Montigny, p. 159

Lois Municip. de 1865.

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DORION, Ch. J.:—

I am satisfied neither with the first judgment nor with the judgment in Review. There was undoubtedly a gross violation of the rights of domicile by Charbonneau. Neither the Chief of Police nor any one else has a right to enter the house of a citizen without a warrant. The first Court awarded $250 damages. This was excessive. There is no doubt that Charbonneau acted in good faith. He was mistaken as to his right and his duty. The corporation, instead of disavowing him, took up his *fait et cause*. Under the circumstances, if I had been sitting in the Court below, I would have given more than the sum of $25 allowed by the Court of Review, but I would not have been disposed to give as much as $250 which was allowed by the Court of first instance. The question is, the judgment of the Court of Review having maintained the plaintiff's right to damages, whether this Court should interfere with the judgment merely because the amount is a few dollars too little. It may be remarked that the appellant has not proved any real damage more than the loss of a few days' wages, which is covered by the judgment. Under the circumstances we do not think we should disturb the judgment; but we declare that Charbonneau had no right to go into the appellant's house and make an arrest unless he saw a crime committed.

CROSS, J.:—

I concur. The principle is recognized by the judgment that the respondent was in the wrong. As to the amount of damages I am not disposed to interfere. Charbonneau acted in good faith because he was led to believe that there was a den of thieves there.

Judgment of C. R. confirmed.[1]

Trenholme, Taylor & Buchan for appellant.

R. Roy, Q.C., for respondents.

[1] In another appeal, by the son of the appellant in the above case, from a judgment in Review reducing his damages from $150 to $10, the judgment was affirmed for the same reasons.

January 24, 1891.

Coram CROSS, BABY, BOSSÉ, DOHERTY, JJ.

JOHN M INGLIS,
(*Plaintiff in Court below*),
APPELLANT;

AND

GEORGINA A. PHILLIPS ET VIR,
(*Defendants in Court below*),
RESPONDENTS.

Sale—Error as to accessory of thing sold—Damages.

THE appellant purchased from respondents at public auction two lots of land on a certain street, and signed a memorandum of sale in which reference was made to the official plan, on which the street was marked as being 51 feet wide at that place. On the surveyor's plan prepared for the sale, the street was also traced as 51 feet in width, but by inadvertence, on the lithographed copies distributed at the auction sale, the part of the street where the lots were situated was represented as of uniform width with the upper part of the street, which was 60 feet wide. In the advertisements, and in the auctioneer's announcement at the sale, the street was also described generally as 60 feet wide. When the error was discovered the respondents (vendors) offered to cancel the sale if the appellant (purchaser) had been misled by the error on the lithographed copies, but the appellant refused, and brought an action of damages.

HELD:—Affirming the judgment of DAVIDSON, J., M. L. R., 3 S. C. 403, In an action of damages by the appellant (purchaser), that he having received the full number of square feet bargained for, having refused to relinquish the bargain, having signed the memorandum of sale in which reference was made to the homologated plan showing a street 51 feet wide, and moreover no specific damage being proved, an action of damages could not be maintained.

APPEAL from a judgment of the Superior Court, Montreal (DAVIDSON, J.), Nov. 5, 1887, dismissing the appellant's action. The judgment of the Court below is fully reported in M. L. R., 3 S. C., pp. 403-412.

Nov. 20, 1890.]

L. H. Davidson, Q.C., for appellant:

It is indisputable that lithographic plans representing

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the street as of uniform width were posted up in the neighborhood of the property prior to the auction sale, and that plans similar thereto were used at the auction sale and were circulated amongst the audience.

It is also indisputable that appellant and others present at the sale acted upon these plans, which were accepted by them and used; that the properties were adjudged according to the plan; and that no intimation was given by the auctioneer of any difference in the width of Bishop street above and below St-Catherine street.

Further the sale was extensively advertised; and a copy of *The Montreal Herald* is produced containing one of such advertisements, and in it these announcements are made:

"The only opportunity to purchase on the most prominent streets east of Mackay and west of Mountain, on Sherbrooke and St-Catherine, and the new streets recently homologated, running from Sherbrooke to Dorchester, viz: Bishop and Crescent.

"All the new streets as homologated by the corporation are ample in width, being each sixty feet, or as wide as our leading thoroughfare, St-James st."

More than that, it is established by the testimony of Mr. A. A. Stevenson that the auctioneer at the time of the sale declared that the width of Bishop street was sixty feet, and that no reference was made to any difference of width above and below St-Catherine street.

According to the terms published prior to the sale; according to the plan submitted at the sale; according to the declarations of the auctioneer who acted in behalf of the respondent at the sale, the appellant was led to believe the property for which he bid and which was finally adjudged to him, to be situated upon a sixty foot street; and he bought, not with the object of speculation but for the purpose of erecting thereon a house for his own occupation. He finds subsequently that the street is of another and inferior class; that it is of reduced width, and that in order to obtain that for which he bid,

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viz: a lot fronting on a sixty foot street, it will be necessary to take nine feet off the whole length of his property.

It is manifest that there was no intention to vary, by the memorandum of the sale signed, the public announcements made before and at the sale; and that such memorandum of sale must be read in connection with what preceded it.

The description therein of the lots purchased, according to the official plan, was not intended to bind the purchaser to any different description than that referred to at the sale itself. Evidence of the representations made and of the terms and conditions accepted and understood to be existing by the parties at the time of the sale was rightly admitted and does affect the interpretation of the contract.

3 B. & C., p. 623, *Dobell* v. *Stevens: Held*, that the purchaser might maintain an action on the case for deceitful representations although they were not noticed in the conveyance of the premises or in a written memorandum of the bargain which was drawn up after these representations were made.

6 *Clark & Finnelly*, *Atwood* v. *Small*, pp. 330, 395, 502.—Lord Wyneford says at p. 502, as to setting aside the contract, that being the demand in that instance, "I do "not agree that in order to set aside the contract, the par- "ties must appear to have been induced *entirely* to enter "into it by false representations; I say if the parties are "induced fraudulently in any way, although they may "have other reasons for entering into the contract, if the "strong grounds which prevailed on them to enter into "the contract were fraudulent representations, *that* will "give an action in a Court of law... If a party chooses to "trust to the representations and does not make any en- "quiry, that reliance will be sufficient to make out a "charge of false representations, so as to set aside the "contract."

Kerr—Fraud and Mistake, pp. 324, 326, 330, 334, 388, 389. At p. 324, under the title "Remedies at Law," Mr. Kerr says: "An action on the case for damages in the na-

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"ture of a writ of deceit lies at law, against a man for "making a false and fraudulent representation, whereby "another is induced to enter into a transaction and by "so doing sustains damage. If the representation be false "it is immaterial that it may have been made without "fraudulent intent; or that the party who made it may "have derived no benefit from it. The principle of law "is that fraud, accompanied by damage, is in all cases, a "good cause of action;" and at p. 330 he adds, "but "although it may no longer be open to the party de-"frauded from the change of circumstances which has "taken place in the meantime to avoid the contract upon "the discovery of the fraud, he has the remedy by action "of deceit for damages against the party by whose repre-"sentations he has been misled to his injury." And as to *proof*, at p. 388, he says: "If a person be induced by "fraudulent statements, to enter into a written contract, "it is competent for him to prove fraud by evidence "*aliunde*, although the written contract or the deed of "conveyance is silent on the subject to which the frau-"dulent representation refers. So also if it appear from "the written evidence that the agreement really made "between the parties is not stated by the deed, parol evid-"ence is admitted to explain it."

The strictness of the English law under the special statute, and referred to in Taylor, can hardly be held applicable in view of the terms of our own article 1507 C. C. L. C., which distinctly recognizes "conditions of sale announced by the auctioneer", which must have reference to *verbal* announcement inasmuch as it is given as an exception to the rule contained in Article 1235.

Geoffrion, Q.C., and *Cruickshank*, for respondent.

Jan. 24, 1891.]

CROSS, J. (after stating facts) :—

It appears that the error in the lithographic copies was purely accidental, and that the representation at the sale was nothing more than the production of a plan from which it might be inferred that the street was sixty feet

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wide throughout, instead of being sixty feet in one part and fifty-one feet at another part. We are of opinion that there was no fraud or misrepresentation. There might be ground for asking that the sale be annulled, but there is no ground for damages. In *Wood & St-Germain*, noted in Ramsay, 640, it was held by this Court that where real estate was sold described as being bounded on one side by "Belmont Avenue," there being in fact no avenue but a projected street, not belonging to the vendor, it was not a warranty that there would be a street made there.

BOSSÉ, J., had considerable hesitation in concurring, there having been an error in the advertisements of sale.

Judgment confirmed.

Davidson & Ritchie for appellant.

Cruickshank & Ferguson for respondents.

(J. K.)

March 26, 1891.

Coram CROSS, BABY, BOSSÉ, DOHERTY, JJ.

JOSEPH C. H. LACROIX,
(*Defendant in Court below*),
APPELLANT:

AND

LÉANDRE FAUTEUX,
(*Plaintiff in Court below*),
RESPONDENT.

Lessor and lessee—Lease—Tacit reconduction—Notice to terminate—Art. 1067, *C. C.*

HELD:—That where a lease in writing is continued by tacit reconduction, the notice necessary to terminate it must be in writing.

APPEAL from a judgment of the Superior Court, Montreal (WURTELE, J.), May 31, 1890, in the following terms:—

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"La Cour, après avoir entendu les parties, par leurs avocats, sur le mérite de la cause, avoir examiné la procédure et les pièces produites, avoir entendu à l'audience les témoins produits par le demandeur, et le défendeur examiné comme témoin et avoir délibéré;

"Attendu que le demandeur comme propriétaire de la partie non subdivisée du lot No. 1195 du cadastre du quartier St-Jacques, de la cité de Montréal, avec une maison en pierre à trois étages et autres bâtisses dessus construites, en vertu d'un titre d'achat du 9 novembre 1889, dûment enregistré avec jouissance des revenus depuis le 1er du mois, réclame du défendeur la somme de $300, étant pour le loyer de la dite propriété du 1er novembre 1888 au 1er mai 1889, à raison de $600 par année, que le défendeur devait en vertu d'un bail pour une année à compter du 1er mai 1887, contenu dans un acte de vente de la dite propriété et d'autres propriétés consenti par le défendeur à Dame Marie Emma Corine Marcoux le 13 août 1887, devant Mtre. O. Marin, notaire, et par l'occupation du défendeur continuée après l'expiration de la dite année, sans autres conventions, et qu'il demande que le défendeur soit expulsé de la dite propriété, avis de congé lui ayant été donné par le demandeur avant le 1er février 1890;

"Attendu que le défendeur plaide qu'à l'expiration du dit bail d'une année, il aurait continué d'occuper la dite propriété sans bail écrit pour une autre année à raison de $400 pour l'année comme le locataire du nommé Charles W. Philips, qui avait acquis la dite propriété de la dite Dame Marie Emma Corine Marcoux, et qu'il aurait ensuite été continué par tacite reconduction pour le même loyer annuel de $400, qu'il aurait payé ce loyer de $400 intégralement au dit Philips et ensuite six mois de loyer sur le même pied, du 1er mai au 1er novembre 1889, suivant reçu du 22 octobre 1889, au nommé James Baxter qui avait acquis la dite propriété et l'a vendue après ce paiement au demandeur; qu'il aura offert $200 au demandeur pour les six mois de son loyer, du 1er novembre 1889, au 1er mai 1890, le 11 février 1890, par le ministère

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de Mtre. O. Marin, notaire ; et que le demandeur ne lui avait pas donné avis de congé dans le délai prescrit par la loi ; et que le défendeur a consigné la dite somme de $200, avec son plaidoyer ;

"Considérant qu'il a été constaté en preuve que le nouveau bail intervenu entre les dits Charles W. Philips et le défendeur a été fait moyennant un loyer annuel non de $400 mais de $500, et que le reçu de $400 donné par le dit Philips est expliqué par le fait qu'une somme de $100 aurait été accordée au défendeur pour des réparations à la charge du propriétaire, qu'il prétendait avoir faites, et par ces mots qu'il contient : 'he paying for all repairs that have been done to the house to this date ;'

"Considérant que l'on trouve un commencement de preuve pour justifier la preuve par témoins de la nouvelle convention dans l'allégation contenue dans le plaidoyer du défendeur, 'qu'à l'expiration du dit bail le défendeur aurait continué à occuper le dit immeuble sans 'bail écrit comme locataire du dit Philips,' et dans la phrase suivante dans sa déposition : 'Il m'a demandé si 'j'avais un bail ; j'ai dit que j'avais un bail verbal ;'

"Considérant que la tacite reconduction invoquée par le défendeur après le bail verbal qui s'est terminé le 1er mai 1889, a dû nécessairement avoir lieu pour le même loyer de $500 par année, et qu'il appert en preuve que quand le dit James Baxter a pris les $200 mentionnées dans le reçu du 22 octobre 1889 il n'a pas acquiescé à la prétention du défendeur que le loyer annuel était de $400, mais qu'il a pris cette somme de $200, et a signé le reçu en question que parce qu'il ne voulait pas entreprendre un procès pour la balance et qu'il a prié monsieur Geoffrion qui agissait pour le défendeur de tâcher de percevoir pour lui cette balance ;

"Considérant que la somme due par le défendeur au demandeur pour le loyer de six mois du 1er novembre 1889 au 1er mai 1890 est de $250 ; et que partant l'offre légale du défendeur est insuffisante ;

"Considérant qu'un avis de congé peut être donné verbalement et peut être établi par l'aveu du locataire ou

prouvé par témoins quand il y a un commencement de preuve par écrit ;

"Considérant que l'on trouve un commencement de preuve par écrit pour permettre la preuve de l'avis de congé par témoins dans la déposition du défendeur où il dit : 'j'y suis allé (chez le demandeur) avant le premier 'février ; j'ai été lui offrir son loyer et savoir si je devais 'rester dans ma maison. Cela était le 27 janvier ;'

"Considérant que le demandeur a prouvé par le témoignage de son fils Thomas Arthur Fauteux qu'il a donné un avis de congé le dit 27 janvier 1890, et que la lettre du 5 février 1890, qui contient aussi un avis de congé, a été envoyée d'abondant pour se débarrasser des obsessions du défendeur, qui cherchait toujours à persuader le demandeur de lui laisser la maison ;

"Considérant que le défendeur est mal fondé dans son plaidoyer et que le demandeur a droit de demander son expulsion ;

"Renvoie le plaidoyer du défendeur et déclare ses offres insuffisantes, condamne le défendeur à payer au demandeur la somme de $250, pour six mois de loyer, du 1er novembre 1889 au 1er mai 1890, avec intérêt du 5 mai 1890, date de l'assignation, et les dépens distraits à maîtres Rainville et Archambault, les avocats du demandeur, et ordonne au défendeur de livrer la possession au demandeur du dit immeuble, désigné au long comme suit : (*Description*) ;

"Et décrète qu'à défaut par lui de ce faire dans le délai de dix jours après la signification d'une copie du présent jugement il soit expulsé lui et les siens des dits lieux, et que tous les biens meubles qui peuvent s'y trouver soient enlevés et mis sur le carreau sous l'autorité de cette Cour, et que le demandeur soit mis en possession pleine et entière du dit immeuble."

Jan. 20, 21, 1891.]

Geoffrion, Q. C., for appellant :—

Le 15 août 1887, l'appelant vendit à madame Kerouack, entr'autres propriétés une maison et ses dépendances

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situées sur la rue Sherbrooke à Montréal, qui est la même que celle décrite en la déclaration de l'intimé.

Dans l'acte de vente, un bail de la maison est consenti par Mme Kerouack en faveur de l'appelant jusqu'au 1er mai alors prochain à raison de $600 par année.

Le 5 septembre 1887, madame Kerouac vendit le même immeuble à Chs. W. Philips, à la charge du bail plus haut mentionné.

Le 1er mai 1888, l'appelant continue à occuper les prémisses à titre de locataire.

Le 29 décembre 1888, Philips par l'entremise de son agent Frédérick Hudson, sur paiement à lui fait de la somme de $400, remit à l'appelant le reçu suivant: "Re- "ceived from J. H. Lacroix the sum of $400, being pay- "ment in full of rent of 334 Sherbrooke Street house up "to May 1st, 1889, he paying for all repairs that have "been done to the house up to this date"

Plus tard Philips ayant vendu la propriété à James Baxter, celui-ci signa en faveur de l'appelant le reçu suivant en date du 22 octobre 1889: "Reçu de J. C. H. "Lacroix, écr., la somme de $200, étant pour le loyer de "la maison No. 334 rue Sherbrooke, du 1er mai dernier "au 1er novembre prochain (1889), ce loyer est payé à "James Baxter, écr., agissant aux présentes par H. B. "Rainville, écr., comme étant aux droits de Charles "William Philips, en vertu d'un acte de transport et ces- "sion par W. A. Caldwell, en sa qualité de curateur à la "faillite du dit Philips au dit James Baxter, reçu devant "Mtre. Kittson, N. P., le 11 septembre dernier."

Le 11 février 1890, l'appelant fit des offres réelles à l'intimé de $200, étant $100 pour le terme de loyer échu le 1er du même mois, et $100 pour le terme à échoir le 1er mai alors prochain.

Ces offres furent refusées par l'intimé comme insuffisantes, et le 5 mai dernier (1890) un bref d'assignation sous l'acte des locateurs et locataires fut pris par l'intimé qui demande dans ses conclusions: 1o. une condamnation pour $300, étant pour deux termes de loyer à raison de $600 par année; 2o. l'expulsion de l'appelant à qui l'in-

timé prétend avoir signifié un congé régulier avant le 1er février 1890.

L'appelant, par sa défense prétend : que son bail a été continué par tacite reconduction depuis le 1er mai 1888, avec la modification que le loyer fut réduit à $400 par année et qu'en conséquence ses offres de $200 qu'il renouvelle, sont suffisantes ; 2. Qu'il est faux que l'intimé ait signifié aucun congé à l'appelant avant le 1er février 1890 ; que le seul congé que l'appelant ait reçu est par lettre missive de l'intimé, datée le 5 février et délivrée à l'appelant le 7 février 1890, que ce congé est tardif et que le bail alors existant a été renouvelé pour une autre année.

L'intimé répond que la tacite reconduction invoquée par l'appelant a eu lieu pour le même loyer ; que lors du paiement fait à Philips, quoique le reçu ne mentionne que $400, une somme de $200 avait été payée en réparations ; que quant au reçu de James Baxter il a été obtenu sous de fausses représentations et que d'ailleurs le dit reçu n'aurait été signé que sous protêt ; que l'intimé n'était pas obligé de donner congé, mais qu'à tout événement l'intimé l'a donné légalement.

Première question.—L'offre de $200 est-elle suffisante ? Les écrits produits par l'appelant font une preuve complète à l'appui de sa défense. Il ne peut pas y avoir deux interprétations du reçu de James Baxter, l'auteur de l'intimé ; celui de Philips est également clair et explicite, seulement il contient les mots suivants : *he paying for all repairs that have been done to the house up to this date*, sur lesquels l'intimé base sa prétention qu'il peut prouver contre le contenu de cet écrit, et chose étrange la Cour inférieure est tombée dans cette erreur.

Remarquons de suite que l'appelant qui a été examiné comme témoin par l'intimé n'a pas été questionné sur ce point ; Hudson qui a signé le reçu et touché l'argent directement des mains de l'appelant n'a pas été examiné pour expliquer les circonstances où ce reçu a été donné ; le seul témoin entendu pour prouver contre le contenu

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de cet écrit est Philips lui-même; il va sans dire que l'appelant s'est objecté à cette preuve.

Nous réservons nos commentaires sur la crédibilité de ce témoin et sur la vraisemblance de son récit pour l'audition de la cause; qu'il nous suffise d'observer qu'il y a contradiction entre les allégations de l'intimé et la version de ce témoin complaisant. L'intimé soutient que la tacite reconduction a eu lieu à raison du loyer originaire de $600; Philips admet que le loyer a été changé, mais il affirme qu'il n'y a eu qu'une réduction de $100, laissant au lieu de $600 un loyer de $500. En face des termes formels du reçu: *Received from* J. H. Lacroix the sum of $400 *being payment in full of rent*..... up to May 1st, qui ne mentionnent pas *une balance de loyer*, Philips affirme qu'une autre somme de $100 était allouée pour des réparations, l'intimé soutient que c'est $200, et si l'appelant eut soutenu que c'était $10, $20 ou $30 que deviendrait le reçu dans tout cela?

N'est-il pas plus raisonnable et surtout plus légal de s'en tenir au reçu qui parle par lui-même? De trouver dans ce reçu que le loyer était réduit à $400 à cause de l'état dilapidé de la maison; que les réparations faites par l'appelant étaient la cause et la raison de cette réduction, et non pas la valeur reçue ou considération chiffrée par Philips à $100 ni plus ni moins.

Mais supposons qu'il ait pu y avoir mal entendu lors du reçu de Philips, comment peut-on soutenir la même chose quant au reçu de Baxter? Aussi l'intimé change-t-il de tactique; quant à ce reçu il a été obtenu sous de fausses représentations.

Halte là! Cette fois l'appelant n'est plus à la merci d'un témoin qui s'arrange pour raconter une histoire où les contradictions sont impossibles; cette fois l'appelant a agi et a été représenté par un tiers, et ce tiers a été entendu comme témoin.

Le reçu signé par Baxter a été préparé par C. A. Geoffrion, l'aviseur légal de l'appelant; il a été soumis à l'avance au créancier, les prétentions du débiteur ont été clairement expliquées, le reçu de Philips a été commu-

niqué à Baxter qui en a pris copie. S'est-il consulté ou non avec Philips, nous l'ignorons ; toujours est-il qu'en pleine connaissance de cause Baxter ayant accepté $200 pour les deux premiers termes de l'année commençant le 1er mai 1889, son ayant cause ne peut pas réclamer plus que son auteur pour les deux derniers termes.

Baxter a été trompé, prétend-on ; s'il l'a été c'est qu'il l'a voulu, il a été mis à même de s'assurer de l'exactitude des prétentions de l'appelant, il les a discutées avec l'agent de l'appelant et s'est décidé à accepter le montant offert *sans réserve ni protêt ; volenti non fit injuria.*

Deuxième question.—Insuffisance du congé ou mise en demeure.

L'article 1657 de notre Code déclare quand le locateur est tenu de donner congé au locataire ; la jurisprudence n'est plus incertaine quant à la nécessité du congé pour mettre fin au bail écrit continué par tacite reconduction. Notre article ne dit pas en quels termes et de quelle manière ce congé doit être signifié, il faut donc recourir aux règles ordinaires de la mise en demeure.

L'article 1067 de notre Code qui régit cette matière correspond à l'article 1136 du Code Français, mais il en diffère notablement. Il convient de mettre en regard ces deux articles, afin de mettre la Cour en garde contre les précédents et les autorités que l'on trouve en France.

Notre article 1067 se lit : " Le débiteur peut être cons-
" titué en demeure soit par les termes même du contrat,
" lorsqu'il contient une stipulation que le seul écoule-
" ment du temps pour l'accomplir aura cet effet, soit par
" l'effet seul de la loi ; soit par une interpellation en jus-
" tice ou une demande qui doit être par écrit à moins que
" le contrat lui-même ne soit verbal."

L'article 1139 du Code Napoléon est comme suit : Le débiteur est constitué en demeure, soit par sommation ou par autre acte équivalent, soit par l'effet de la convention, lorsqu'elle porte, que, sans qu'il soit besoin d'acte, et par la seule échéance du terme, le débiteur sera en demeure.

Comme on le voit notre code exige que la demande

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signifiée au débiteur *soit par écrit*, le Code Français ne contient pas cette disposition. Nonobstant ce silence du Code Français quant à la forme de la demande (qui est équivalente ici à notification, avis, protêt) les auteurs sont loin de s'entendre sur cette question.

Duranton, tome 17, Nos. 121, 122; vol. 9, édition belge, p. 243.

Gillouard, vol. 37 (1er vol. Louage), Nos. 381, 382, 383, 431.

Sirey, Code Annoté, Art. 1736, No. 31. Supplément, Nos. 3, 4, 5.

Sirey, Code Annoté, Art. 1715, Nos. 1, 15. Supplément Nos. 1, 11.

Nous ne trouvons dans notre jurisprudence que deux causes rapportées, *Molleur* v. *Favreau*, 1 L. C. L. J., p. 28. Cette décision est antérieure au Code, et il s'agissait d'un bail verbal. Notre article donné comme ancien droit fait une exception pour la mise en demeure quand le contrat est verbal; nul doute que lorsque les parties se sont dispensées d'écrits pour le contrat, la mise à exécution puisse en être requise dans la même forme, c'est-à-dire sans écrit. Cette décision ne peut donc pas jeter de lumière sur la question qui nous occupe, si ce n'est qu'elle ne donne que plus de portée à notre article 1067 qui a été rédigé après cette décision, où la raison de renverser le jugement sujet à la révision est, que le contrat étant verbal la mise en demeure verbale suffisait.

L'autre décision est celle de *Bélanger et Paxton*, 14 R. L., p. 526; dans cette cause la Cour de Révision a renversé le jugement du juge Mathieu donnant à l'article 1067 la signification que nous prétendons être la véritable; le juge Wurtele dans la présente cause a suivi cette jurisprudence.

Nous sommes aujourd'hui devant une Cour d'une juridiction supérieure, qui n'est pas liée par le précédent de *Bélanger* v. *Paxton*; nous pouvons donc discuter cette question intéressante, sans attacher à cette décision d'autre importance que celle qui peut lui donner la force du raisonnement adopté par le tribunal inférieur.

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Distinguons de suite les cas où l'aveu de la partie ne peut avoir qu'un effet unilatéral de ceux où les faits avoués donnent lieu à des obligations et droits réciproques ; et encore les cas où les parties ont pu mettre par écrit leurs conventions de ceux où le consentement des deux parties n'est pas nécessaire pour créer une obligation ; dans la première hypothèse nous admettons, mais sous toute réserve, que l'aveu de la partie peut tenir lieu d'un écrit, mais dans la seconde hypothèse nous soutenons que rien ne peut remplacer l'écrit à moins d'une convention agréée par les deux parties. Comparez les articles 1067, 1235, 1690 ; nous soumettons que le jugement de cette honorable Cour *in re Beckham & Farmer*, 22 L. C. J., p. 261, n'est pas contraire à la doctrine que nous soutenons, mais l'admet plutôt implicitement.

L'article 1067 de notre code n'a-t-il pas été rédigé pour faire face à de semblables éventualités ? D'ailleurs le motif nous parait évident ; la mise en demeure n'est pas l'acte des deux parties, il n'y a pas d'entente, donc il faut la revêtir des formes exigées par la loi.

Nous concluons en disant : 1o. que les offres étaient suffisantes ; 2o. que l'expulsion ne peut être ordonnée vu l'absence de congé signifié à l'intimé ; qu'en conséquence le jugement doit être renversé.

Archambeault, for respondent :—

Les prétentions de l'intimé sont : 1o. Que l'appelant lui doit au moins $250 de loyer ; 2o. Que le congé n'était pas nécessaire pour mettre fin au bail ; 3o Que dans tous les cas, un avis verbal de déloger a été donné à l'appelant, et que cet avis verbal était suffisant ; 4o. Qu'enfin l'expulsion doit être prononcée, pour les causes ci-dessus.

Un congé n'était pas nécessaire dans les circonstances de cette cause.

Avant le code, la vente de la chose louée mettait fin au contrat de louage. Les codificateurs, dans leur rapport sur le titre de louage, exposent l'ancien droit sur cette question comme suit : " Art. 56. Le contrat de louage est " terminé par la vente que le propriétaire fait de la chose

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"louée, et le locataire peut être expulsé, sauf son droit de "recouvrer des dommages-intérêts de son locateur."

Le Code Civil a innové et déclaré, à l'art. 1663, que l'aliénation de la chose louée ne met pas fin au bail; mais l'art. 2128 ajoute qu'à l'expiration de l'année qui suit l'aliénation, le locataire ne peut se prévaloir du bail que s'il a été enregistré. Ici, il ne saurait être question d'enregistrement, puisqu'il s'agit d'un bail verbal. Donc, l'intimé avait le droit d'expulser l'appelant le 1er mai 1890, sans suivre les formalités édictées par la loi pour mettre fin à un bail.

Nous citerons sur ce point:

25 Laurent, Nos. 388, 389.

4 Aubry & Rau, p. 501, note 32.

25 Jurist, p. 107.

Dans tous les cas, il a été donné à l'appelant un congé verbal en temps voulu pour mettre fin au bail.

Le témoin Thomas Arthur Fauteux, le fils de l'intimé, était présent, le 27 janvier dernier, à une conversation qui a eu lieu entre les parties, et l'intimé a alors déclaré à l'appelant qu'il prendrait possession de sa maison le 1er mai.

L'admission de cette preuve testimoniale est justifiée par un commencement de preuve par écrit que l'on trouve dans la déposition de l'appelant: "J'y suis allé (chez l'ap- "pelant) avant le premier février. J'ai été lui offrir son "loyer, *et savoir si j'allais rester dans ma maison.* Cela était "le 27 janvier."

Voir Agnel, Prop. et Loc., No. 885.

25 Laurent, Nos. 327-328.

Pour ces diverses raisons, l'intimé avait droit de demander l'expulsion de l'appelant. Nous résumons nos prétentions en disant: 1o. que le congé n'était pas requis à l'expiration de l'année du bail, parce ce bail n'a pas été enregistré;

2o. Un avis de congé d'au-delà de trois mois a été régulièrement donné à l'appelant par l'intimé;

3o. Enfin les offres de l'appelant sont insuffisantes, et c'est là une autre cause d'expulsion.

March 26, 1891.]

Bossé, J. (for the Court) :—

Il s'agit d'une action en éviction par un propriétaire contre un locataire.

Le demandeur prétend que le défendeur devait quitter les lieux le 1er mai 1890 parce que son bail par tacite reconduction était alors expiré, et il réclame de plus $250, pour six mois de loyer échu, à cette date, à raison de $500 par année.

Le défendeur dit qu'il n'était pas tenu de déguerpir parce qu'il occupait, par tacite reconduction ; que cette tacite reconduction ne pouvait être mise à fin sans un congé déloger dans le délai fixé et que ce congé n'avait pas été donné. Il soutient de plus quant au loyer réclamé qu'il ne le doit pour les six mois échus qu'à raison de $400 par an, savoir, $200 ; qu'il avait déjà offert cette somme avant l'action, et il réitère ses offres et les dépose avec ses plaidoyers.

Le jugement a renvoyé le plaidoyer du défendeur sur les deux chefs de défense, a ordonné l'expulsion, déclaré les offres insuffisantes et condamné le défendeur à payer $250.

C'est de ce jugement dont il y a appel.

Il se présente ici deux questions. La première : Quel est le taux du loyer annuel ? la seconde : Si un congé déloger était nécessaire, et, s'il devait être donné comment devait-il l'être ?

Première question : Le bail originaire est contenu dans un acte de vente consenti le 15 août 1887, par le défendeur Lacroix alors propriétaire de l'immeuble en question, à Madame Kérouac, et il est fait pour un an à compter du 1er mai 1887 à raison de $600 pour l'année. Le 5 septembre 1887, Madame Kérouac a vendu la propriété à Philips, et M. Lacroix a continué d'occuper les lieux après l'expiration de son année de loyer, sans qu'il paraisse avoir été, entre lui et le nouveau propriétaire, aucunement question du montant du loyer jusqu'au 29 décembre 1888, date à laquelle on trouve un reçu de Philips, par son

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agent Hodgson, pour l'année entière de loyer, du 1er mai 1888 au 1er mai 1889, pour $400; "Lacroix payant le coût de toutes les réparations faites jusqu'à cette date."

Ce reçu est interprété d'une manière différente par les parties, Lacroix soutenant qu'il établit un loyer à raison de $400 pour l'année, et Fauteux de son côté disant que le loyer était de $500, savoir, $400 en argent, montant porté au reçu comme ayant été alors payé, et $100 coût des réparations aussi mentionnées au reçu.

Fauteux a fait entendre Philips pour établir que le loyer était de $500 et Philips a de fait juré que tel était le montant du loyer, mais il ajoute qu'il avait fait la réduction de $600 à $500 parce que Lacroix avait consenti à quitter la maison en aucun temps de l'année, sous un mois d'avis. Cette convention est improbable en elle-même, mais elle devient impossible si on la met en regard du fait que le paiement de loyer fait au 29 décembre l'était pour toute l'année à allèr au 1er mai alors prochain, et l'on ne peut guère adopter la théorie que Lacroix se serait soumis à cette condition extraordinaire de vider les lieux en aucun temps de l'hiver, sous un mois d'avis, au bon plaisir du propriétaire, et qu'il aurait, en même temps qu'il aurait accédé à cette condition, payé d'avance tout le loyer, pour les quatre mois qui restaient encore à courir, sans savoir s'il pourrait occuper les lieux, pendant toute ou aucune partie de cette période de temps. Hodgson qui avait reçu l'argent et donné le reçu pour Philips n'a pas été entendu.

Ce que l'on peut dire de mieux dans tout ceci en faveur du demandeur c'est que cette preuve n'est pas déterminante; mais les faits subséquents me paraissent donner entièrement raison au défendeur. Le 1er octobre 1889, le curateur nommé aux biens de Philips devenu insolvable, a vendu la propriété à Baxter qui, par le même acte est devenu cessionnaire et créancier du loyer qui avait couru depuis le premier mai. Et nous trouvons au dossier, en date du 22 octobre de la même année, un reçu par lui signé pour $200 avec la déclaration que cette somme était pour le loyer du 1er mai au 1er novembre.

L'on a dit que Baxter n'avait consenti à accepter cette somme que comme pis-aller et parce qu'il s'était convaincu qu'il ne pouvait avoir plus. C'est possible ; mais il n'en est pas moins vrai qu'il a donné le reçu en connaissance de cause, après examen de tous les faits et mûre délibération. Nul doute qu'il a fait tout en son pouvoir pour obtenir le loyer en raison de $500, au lieu de $400, mais seul propriétaire de l'immeuble, libre d'en disposer à son gré, créancier du loyer, et persuadé, soit que le loyer était véritablement de $400, soit qu'il y avait doute et qu'il lui faudrait un procès pour avoir davantage, il a pris pour acquise et pour vraie la prétention du défendeur, et il y a acquiescé. Et recevant le loyer à raison de $400 il l'a définitivement fixé à cette somme.

Le 9 novembre suivant, il a vendu l'immeuble au demandeur et le lui a transmis avec le loyer ainsi déterminé.

Lacroix en offrant au nouveau propriétaire $200 pour les six mois qui restaient de l'année l'a ainsi offert au taux reconnu par Baxter et ses offres doivent, en conséquence, être déclarées suffisantes.

Seconde question : Le congé déloger était-il dans les circonstances, nécessaire avant le 1er février 1890, et s'il l'était comment devait-il être donné ?

Le bail originaire était par écrit. Il est contenu, dans l'acte de vente du 5 août 1887. Plus tard, nous ne savons quand, mais avant la date du 29 décembre 1888, il a été réduit, suivant les prétentions du demandeur à $500, suivant les prétentions du défendeur que nous croyons devoir adopter, à $400. Dans un cas comme dans l'autre, le loyer originaire a été changé dès 1888, pour l'année 1888-89, et la tacite reconduction a commencé le 1er mai 1889.

Il est clair que pour mettre fin à cette tacite reconduction il fallait un congé déloger. Ce sont les termes mêmes du texte de l'art. 1609. Mais ce congé devait-il être par écrit ? C'est la seule question qui reste à résoudre.

S'il s'était agi du bail originaire constaté par écrit dans l'acte de vente, il n'y aurait guère de difficulté à déclarer

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que la tacite reconduction de ce bail originaire n'aurait pu être mise à fin que par un congé écrit émanant de l'une ou de l'autre des parties. Mais ce bail a été modifié en autant que le loyer originaire a été réduit, les uns disent à $500 les autres à $400 ; mais à tout évènement a été réduit à une somme moindre que celle originairement stipulée. S'en suit-il que le congé déloger nécessaire pour mettre fin à la tacite reconduction qui a suivi cette réduction de loyer ne devait plus être par écrit, mais qu'au contraire il pouvait être prouvé par témoins ?

Nous avons vu que l'art. 1609 tout en déclarant que le congé est nécessaire ne s'explique pas sur la manière dont il doit être donné, et nous sommes forcés d'avoir recours aux règles générales. Or l'art. 1067 dit : "Le débiteur " peut être constitué en demeure soit par les termes même " du contrat, lorsqu'il contient une stipulation que le seul " écoulement du temps pour l'accomplir aura cet effet ; " soit par l'effet seul de la loi ; soit par une interpellation " en justice, ou une demande qui doit être par écrit, à " moins que le contrat lui-même ne soit verbal."

Ainsi règle générale, la mise en demeure doit être soit par une interpellation en justice, soit par une demande qui doit être par écrit, à moins que le contrat ne soit verbal.

Si le contrat est lui-même verbal, la mise en demeure peut être de même verbale, et il est raisonnable de dire que si les parties se sont contentées de leur parole respective, et s'en sont rapportées à la bonne foi de l'une et de l'autre, pour la preuve du contrat lui-même, l'on ne doit pas exiger davantage pour la mise en demeure d'exécuter ce même contrat.

C'est là l'exception et la seule exception de l'article. Dans tout autre cas la mise en demeure doit être soit par interpellation judiciaire soit par écrit.

Nous sommes ici en présence d'une tacite reconduction, bail légal, ou plutôt bail légalement présumé, et résultant du fait de la continuation de la possession par le locataire, pendant plus de huit jours, après l'expiration du bail, sans opposition ou avis de la part du locateur.

La loi fait résulter de ces circonstances la présomption légale de l'intention des parties d'avoir voulu faire un bail aux mêmes conditions que l'ancien, et pour une autre année si l'ancien bail était pour un an ou plus.

Or ce bail qui est ainsi légalement présumé est un nouveau bail. Pothier nous l'enseigne distinctement, et tout le monde est d'accord sur ce point ; et appliquant l'art. 1067, il ne peut être question, en cette cause, d'un contrat verbal, ni de la mise en demeure verbale qui peut s'en suivre, comme la seule exception, à la nécessité de la mise en demeure par un écrit.

Ceci est d'ailleurs conforme aux principes généraux et résulte de la comparaison de l'art. 1067 avec les arts. 1235 et 1690.

L'on peut encore dire qu'il s'agit ici d'un droit à la possession d'un immeuble, droit au sujet duquel le contrat, quel qu'il soit, bail ou autre, ne saurait être établi que par un écrit, et dont partant, la résolution ne pourrait être constatée autrement que par un autre écrit—et enfin que l'admissibilité de la preuve par témoins doit être encore plus restreinte lorsqu'il s'agit non d'un contrat où les deux parties ont contracté des obligations réciproques, mais d'un acte unilatéral n'engendrant de droits qu'en faveur d'une des parties, sans aucune obligation de la part de l'autre ; et c'est probablement là une des raisons de la rigueur de l'art. 1067.

Pour ces raisons, je crois que dans l'espèce, le congé devait être par écrit. Or le seul que l'on trouve au dossier est contenu dans la lettre du 5 février écrite par Fauteux à Lacroix et reçue par ce dernier le 7.

Il était signifié trop tard et il est partant sans effet pour mettre fin à la tacite reconduction.

Il paraîtrait de plus pouvoir, par ses termes, être difficilement concilié, avec le congé verbal antérieur prouvé par Fauteux fils, et donnerait lieu de croire qu'il y a eu malentendu et que Fauteux fils a fait erreur ou s'est mépris quelque part lorsqu'il dit que le demandeur avait, dans les derniers jours de janvier donné congé verbal au défendeur.

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A tout évènement, la lettre ne vaut pas comme congé parce qu'elle a été tardivement écrite.

Pour ces raisons, je suis d'opinion de maintenir l'appel; de déclarer les offres de $200 bonnes et valables; que le congé verbal ne pouvait pas être prouvé par témoins; qu'il n'y a pas eu congé par écrit en temps opportun, et que l'action, pour le surplus du montant offert, doit être renvoyée.

The judgment of the Court is as follows :—

"La Cour, etc.....

"Considérant qu'il résulte de la preuve faite en cette cause que le loyer convenu était de $400 par année; que la somme de $200 pour loyer du 1er novembre 1889 au 1er mai 1890 a été offerte par l'appelant à l'intimé dès avant l'institution de l'action; que ces offres ont été renouvelées avec les défenses, et que le montant en a été déposé avec les dites défenses;

"Vu le congé déloger donné par le demandeur au défendeur dans la lettre par lui écrite et envoyée au dit défendeur le 5 février 1890;

"Vu qu'il n'est prouvé aucun autre congé déloger par écrit;

"Considérant que le dit congé déloger du 5 février a été tardivement donné, et comme tel est sans effet;

"Et considérant que la preuve testimoniale d'un congé déloger verbal ne peut valoir pour mettre fin à la tacite reconduction qui a existé de l'immeuble No. 1195 du cadastre du quartier St-Jacques, en question en cette cause; qu'en autant il y a erreur dans le jugement de la Cour Supérieure siégeant à Montréal le 31me jour de mai 1890, dont est appel, cette Cour renverse le dit jugement, et procédant à rendre le jugement que la dite Cour de première instance aurait dû rendre, déclare les offres susdites bonnes et valables, et renvoie l'action avec dépens contre le dit Léandre Fauteux, tant devant cette Cour qu'en Cour Supérieure." Judgment reversed.

Geoffrion, Dorion & Allan for appellant.

Rainville & Archambeault for respondent.

(J. K.)

March 21, 1891.

Coram DORION, C. J., BABY, DOHERTY, CIMON, JJ.

JOHN CRAWFORD ET AL.,
(*Plaintiffs in Court below*),
APPELLANTS;

AND

PROTESTANT HOSPITAL FOR THE INSANE,
(*Defendants in Court below*),
RESPONDENTS.

Nuisance—Asylum for the Insane—Action to compel discontinuance of erection.

HELD:—Where buildings are being erected for a legal and proper object, such as a hospital for the insane, and there is no proof that they are causing or likely to cause any injury to the properties of the neighbours or any diminution of their value, owing to causes for which the proprietors of the asylum would be liable, adjoining proprietors have no right to ask by injunction that the erection of the buildings be discontinued.

APPEAL from a judgment of the Superior Court, Montreal (JETTÉ, J.), April 3, 1889, dismissing the appellants' action. For proceedings in the Court below see M. L. R., 4 S. C. 215, and M. L. R., 5 S. C. 70.

Jan. 26, 27, 1891.]

Geoffrion, *Q. C.*, and *Rielle* for the appellants:—

The circumstances under which the present action was taken were as follows:

The respondents were incorporated by Act of the legislature of this Province (44-45 Vic. ch. 50), on the 30th June, 1881, for the purpose of erecting in the Province of Quebec an asylum or hospital for the treatment of the insane. In pursuance of this object, the respondents, in July, 1887, purchased a site for the erection of the proposed hospital, in the municipality of the village of Verdun, the property chosen being immediately adjoin-

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ing the property of the appellant Hadley and separated by one farm from the property of the appellant Crawford. On the property so acquired, the respondents, in the month of June, 1888, marked out the land necessary for their asylum and proceeded to dig the foundations of the building. At this stage of their proceedings, the appellants took the present action, alleging by their declaration the facts above recited, and further, that the appellants had been for many years owners of the said properties near and adjacent to the asylum property, and residents in the municipality of Verdun ; that the insane asylum in question was in the nature of a public nuisance, and moreover, a source of injury and damage to the appellants ; that the appellants' properties were essentially of a residential nature, and that the asylum would change their character and destination, and greatly depreciate their value; that the appellants and their families would be exposed to danger, injury and annoyance from the neighbourhood of the asylum, and their health would in particular be exposed to danger from the drainage and sewage of this institution. The appellants also alleged that the appellant Hadley and the municipality of Verdun had protested notarially against the erection of said asylum ; that the said municipality had also passed a resolution condemning the asylum as dangerous and objectionable, and that the asylum had been declared dangerous by the Provincial and Local Boards of Health, but that the respondents nevertheless persisted in their undertaking. The appellants, by their conclusions, prayed that the respondents be ordered to desist from erecting or maintaining their asylum on the site in question, and perpetually enjoined from proceeding with their said undertaking ; reserving any right to recover damages to be caused to them by respondents' action in the premises.

The respondents met this action first by a demurrer, based mainly on the following grounds :

1. Because the action as taken did not exist in our law.

2. Because the plaintiffs were not competent to institute the present proceedings without the intervention of the Crown or the Attorney General, the building complained of being described by plaintiffs as a "public nuisance."

3. Because no actual damage was alleged by plaintiffs.

4. Because the joinder of plaintiffs was inadmissible and illegal.

The respondents also pleaded to the merits, alleging:

1. That respondents, in the proceedings complained of, acted under legislative authority, and in pursuance of the object for which they were created by the legislature, and consequently could not be held liable for damage they might cause appellants.

2. That no actual damage had been sustained by appellants, but the damage alleged was future and uncertain.

3. That any such resolutions of the municipal council or of the provincial or local Boards of Health as alleged were passed without hearing respondents.

4. That the respondents, in pursuance of the objects for which they were incorporated, had entered into contracts for the erection of their said building to the extent of $96,000, and any interference with their action would involve injury far greater than could be suffered by appellants.

5. That respondents had exercised and would exercise the greatest care and diligence in the course of their works and in the management of their institution.

6. That an insane asylum was not of necessity a nuisance, and appellants suffered no such damage as complained of, and that, in any event, the respondents, in erecting this building on their own ground, were acting within their legal rights.

The respondents' demurrer was dismissed by judgment of the Superior Court, rendered by the Hon. Mr. Justice Loranger. (M. L. R., 4 S. C. 215.)

It was argued in support of the demurrer that this action prayed for the issue of an injunction against the

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respondents, and that this remedy only existed in our law in the cases specified by the Act, 41 Vic. ch. 14, and in certain other cases specially provided for by statute; that the present case was not covered by any of these statutes, and that in consequence the Court had no power to issue the injunction prayed for. To this it was answered that the right of the Court to issue injunctions or restraining orders exists in our law independent of the statute 41 Vic. ch. 14, which really only established procedure in certain cases. The right has been frequently asserted in our jurisprudence.

"I think it is pretty well understood now that the "Courts and Judges have the power, which existed in "France under another name, and which exists in Eng- "land and the United States under the name of writ of "injunction, to restrain parties to a suit from doing any- "thing that might change the position of the parties "from what it was at the beginning of the suit.

"This has been formally decided by the Court of Ap- "peal in the case of *Bourgouin* v. *The M. N. C. Ry. Co.*, "19 Jurist p. 57."

Dorion, J., in *Carter* v. *Breakey*, 2 Q. L. R. p. 233.

It will be observed that this case was prior to the Act, 41 Vic. ch. 14, and that the injunction in question was demanded in a case not specified by the Act.

In the case of *Bourgouin* v. *The Montreal Northern Colonization Ry. Co.* (19 L. C. J. p. 57) the present Chief Justice of this Court observed: "It has been said that "our Code of Procedure does not provide for a writ of "injunction, and that, therefore, such a writ does not "exist here. I do not believe this is correct. Our Code "contains special provisions in reference to writs of man- "damus, and writs of injunction are substantially the "same as writs of mandamus, the one being generally "used to command the performance of some obligation "and the other to prevent the execution of some unlaw- "ful act, and both may be said to be included in the pro- "visions concerning writs of mandamus," (19 L. C. J. p.

59) In the same case Mr. Justice Sanborn said: "It "may be observed that the writ of injunction in England "is an equity process arising from the Court of Chancery, "while the mandamus is a common law process arising "from the Queen's Bench. The union of law and equity "powers in our Courts obviates the necessity of observ- "ing distinctions which might be reasonable in England "between these writs." (19 L. C. J. p. 62). The *considérant* of the formal judgment in this case states that "l'appelant était bien fondé à demander *un bref d'injonc-* "*tion.*"

Lang v. *Temporalities Board, &c.*, 8 Leg. News, p. 59.

N. B. & M. Fire & Life Ins. Co. & al. v. *Lambe*, 27 L. C. J. p. 222.

Finally, in the case of *Black & Stoddart* (4 Leg. News, 282), this Court seems to have recognized the Act 41 Vic. chap. 14 only as an Act regulating procedure, and this view has been followed in *The City of Sherbrooke* v. *The Sherbrooke Telephone Co.* (12 Leg. News, 354.)

Without examining this question, however, the Court held that this action was an action *en dénonciation de nouvel œuvre*, and as such was undoubtedly recognized by our law. It is beyond question that the *action en dénonciation de nouvel œuvre* can be based on allegations of future damage, and, indeed, it is in case of such damage that this action is specially applicable: "Il n'est pas néces- "saire que l'intérêt soit actuel pour actionner, il suffit "qu'il puisse un jour se réaliser et s'effectuer, pour qu'on "puisse actionner, à l'effet de repousser tout ce qui pourra "nous empêcher de le recueillir."

Pigeau, Vol. 1, Chap 3, S. 1.

This principle has been affirmed in our jurisprudence.

Girard & Belanger, M. L. R., 4 Q. B. 104.

Joyce & Hart, 1 Can. S. C. R. 321.

Passing to the merits of the action, the following questions of law must be examined.

1st. Is the right of ownership as set forth in Art. 406 of the Civil Code limited or modified by the rights of neighbouring proprietors?

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2nd. Can a proprietor who suffers damage from undertakings carried on by a neighbour on his own property, demand the suppression or cessation of these undertakings, or has such a proprietor only a claim for damages?

3rd. If the previous questions be answered in the affirmative, does the Act of the Legislature incorporating the respondents protect them from the legal consequences of their acts and debar the appellants from exercising the legal remedy which they would otherwise possess?

The learned Judge of the Court of first instance, adopting the line of discussion indicated, found it unnecessary to examine the evidence, as, in his opinion, the incorporation of the respondents by the legislature protected them from the action as brought.

I. Article 406 of the Civil Code states that "Owner-"ship is the right of enjoying and of disposing of things "in the most absolute manner, provided that no use be "made of them which is prohibited by law or by regula-"tions."

This article is taken *verbatim* from the Code Napoléon, Art. 544. It is supplemented by article 399 of our Civil Code. "As to individuals, they have the free disposal of "the things belonging to them, under the modifications "established by law."

From these articles, it might be inferred that so long as a proprietor violated no law or regulation he might make what use he pleased of his property without regard to the inconvenience or damage caused to his neighbour, and this argument was used by the respondents.

The authorities on whom our law is based, however, make it clear that the rule stated in article 406 is not absolute, but is subject to the restrictions resulting from neighbourhood, or *voisinage*.

Pothier defines "ownership" as follows: "Le droit de "disposer d'une chose comme bon semble, *sans donner* "*atteinte aux droits d'autrui*, ni aux lois."—*Int. Gén. Aux Coutumes*, s. 100.

"Nous avons défini le droit de propriété, le droit de "disposer à son gré d'une chose; et nous avons ajouté

" *sans donner néanmoins atteinte au droit d'autrui*.....cela " s'entend aussi du droit dés propriétaires et possesseurs " des héritages voisins auxquels le propriétaire d'un " héritage, quelque parfait que soit son droit de propriété " ne peut donner atteinte, ni par conséquent faire dans " son héritage *ce que les obligations qui naissent du voisinage* " *ne lui permettent pas de faire* dans son héritage au préjudice " de ses voisins."

Pothier, Traité du domaine de Propriéte,s. 13.

" Le voisinage oblige les voisins à user chacun de son " héritage de manière qu'il ne nuise pas à son voisin."

Pothier, Traité du voisinage, s. 235. (2nd appendix to Tr. de la Société).

The French authors agree in stating that Art. 544 of the Code Napoléon must be read with this tacit restriction, and that so fundamental is this principle that an express text of the law would be necessary to do away with it. *Laurent*, Vol. 6, s. 136; *Demolombe*, Vol. 12, s. 653.

II. The proprietor who is injured by operations carried on by his neighbour, on the property of the latter, has his recourse in damages, on the general principles laid down in Art. 1053 of the Civil Code, and this is the case, whether the operations complained of have the sanction of the administrative authorities or not.

Demolombe, Vol. 12, s. 653.

The proprietor thus injured, or about to be injured, has, however, another remedy, the *action en dénonciation de nouvel œuvre*, an action existing in the old French Law, which has passed into the modern French Law, and is recognized by the law of this Province.

III. The existence of the action as taken being established, the only point remaining to be examined before discussing the evidence is whether the respondents are protected from this action by the fact of their incorporation by the legislature.

The French law, as above stated, allows the proprietor who has been injured by his neighbour to claim dam-

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ages, and this right appears to be absolute and without exception.

Under the French law, the appellants would have an undoubted right to recover such pecuniary damages from the respondents as they might be able to prove, and this whether their establishment were authorized by the administration or not. By the present action, however, no damages were claimed, but a restraining order was prayed for, and the learned Judge of the Court of first instance held that this could not be granted. The learned Judge, in coming to this decision, was guided by a distinction in the French law as laid down by *Laurent* Vol. 6, s. 150.

" Les tribunaux peuvent-ils prononcer la suppression " des établissements reconnus dommageables? Il faut " distinguer si ces établissements ont été autorisés ou non. " S'ils ont été fondés avec autorisation, le juge ne peut pas " en ordonner la suppression. Que faut-il décider si " l'établissement n'a pas été autorisé? D'après les prin- " cipes, les tribunaux peuvent ordonner la suppression " d'un fait qui est une cause permanente de dommage " illicite."

The distinction made by Laurent is recognized by all the leading authorities, and it is therefore necessary to see what analogy, if any, exists between the authorization granted by the administrative authority in France to certain classes of establishments, and the Act incorporating the respondents; for it is on this analogy that the judgment of the Superior Court really rests.

The establishments to which this authorization is granted in France are known as " *établissements dangereux, insalubres ou incommodes.*" They are divided into three classes, according to the danger or inconvenience caused to persons or property in their vicinity.

Trébuchet. Code des Etab. dangereux etc. p. 18.

The authorization of the administration is only granted to these establishments on condition that those who apply for it comply strictly with a number of formalities, which

enable the local municipal authorities and individual proprietors interested to oppose the erection of such establishments. For instance, in the case of the first, or most dangerous class of establishments, a petition for authorization must be presented to the Prefect of the Department. This petition must state the exact nature of the operations to be carried on in the establishment, it must be accompanied by a plan of the building, and must show the exact distance of the building from the properties or houses adjoining it.

Public notices of this petition are posted by the prefect at numerous points within a radius of two miles; these notices remain posted for a month, during which time any person can present an opposition.

The petition can also be opposed by the Mayor of the Commune in which it is proposed to erect the establishment. After this delay, the Mayor of the Commune holds an enquête *de commodo et incommodo*, which must last at least one month, and at which any inhabitant of the Commune may give his opinion on the question. The oppositions, if any have been made, are judged by the Conseil de Préfecture, who report to the Conseil d'Etat, and on the decision of that body, the authorization is either granted or refused.

Trébuchet, Code des Etab. dang., &c., p. 19 *et seq.*

Macarel, Manuel des Ateliers Dang., &c., (prelim. p. 15 *et seq.*)

From this sketch of the formalities necessary under the French law to found an establishment considered dangerous, it can be seen how entirely different the authorization granted is from the Act of our Legislature incorporating the respondents.

The theory of the French law in this matter, as shown in these regulations, is that the exact site of the proposed establishment should be known; that every one interested, near or remote from the establishment, should be heard in the matter; that the local municipality should give its corporate opinion, and that the establish-

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ment should only be allowed after the authorities have weighed every opinion and given ear to every voice. What is there in all this in the Act incorporating the respondents?

This statute (44-45 Vic. ch. 50) states that whereas an insane asylum is desirable in this Province in connection with the Protestant denomination, and whereas "the "petitioners have further represented *that such institution* "*would be greatly aided by an Act of incorporation*," therefore, &c.; the Act gives general powers to hold lands in this Province, and to establish such an insane asylum. It was passed on *ex parte* representations, and, indeed, could not be opposed by any one in particular, as no site was indicated for the proposed asylum. The attitude of the municipality of Verdun on the matter, and the evidence of members of the municipal council and of the neighbouring proprietors, show that the legislature would certainly not have granted the petition of those who applied for this Act had the actual site of the asylum been specified.

But there is a further and essential difference between the authorization of the French law and this Act of the Quebec legislature. The establishments authorized, after this elaborate inquiry, are establishments which are otherwise illegal, and it is only in virtue of the administrative authorization that they exist at all. On the other hand, the confinement and cure of the insane is not illegal, and the Act relied on by the respondent is purely and simply an Act of incorporation allowing the petitioners to do as a corporation what they had a right to do as individuals, and limiting their corporate powers. Now, when this Act does not, directly or indirectly, give this corporation any right not possessed by any individual, how can it be held to tacitly free them from any individual's responsibility? Finally, there is no mention of hospitals or asylums of any kind in the categories of *établissements dangereux* in the French law.

It is submitted that the analogy sought to be estab-

lished is fallacious and is not to be maintained in face of the facts.

The appellants submit that the real object of the statute in question is not the maintenance of an insane asylum in the Province of Quebec (which was allowed by the common law, and for which, therefore, statutory sanction was not needed), but only the incorporation of the respondents.

Admitting for the purposes of argument, however, that the object of the statute was, as the respondents pretend, the creation of an insane asylum, and that all their actions have been in pursuance of this object, it is submitted that if the respondents, in so doing, violate the obligation of *voisinage* or cause a nuisance, they are liable to restraint by injunction.

The leading case on the point is *The Metropolitan Asylum Board of Works* v. *Hill et al.*, L. R. 6 Ap. Ca. 193. In this case the limits of statutory protection to corporations creating nuisance are so fully discussed and so clearly defined that the *dicta* of the Judges may be cited at some length.

The holding was as follows:

"The Metropolitan Poor Act, 1867, authorizes the "formation of districts and district asylums for the care "and cure of sick and infirm poor, creates corporations "for that purpose, gives authority to the Poor Law Board "to issue directions to these corporations, enables them "to purchase lands and erect buildings for the purposes "of the Act, and makes the rates of parishes and unions "liable for the outlay thus incurred. But it does not, by "direct and imperative provisions, order these things to "be done, so that if, in doing them, a nuisance is created "to the injury of the health or property of persons resi- "dent in the neighbourhood of the place where the land "is purchased, or the buildings erected, it does not afford "to these acts a statutory protection. And therefore, "when such nuisance was found as fact, *Held*, that the "District Board could not set up the statute, nor the "orders of the Poor Law Board under it, as an answer to

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" an action, or to prevent an injunction issuing to restrain " the Board from continuing the nuisance."

The appellants contended that they were protected in their action by statutory authority, that they were constituted a public body by virtue of a statute, that they had public duties specially assigned them by the legislature and that they were only obeying the orders of the Local Government Board, that their work was a great public benefit, and that no action could be maintained on the part of a private individual. The Lord Chancellor observed:

" If the legislature had authorized some compulsory " interference with private rights of property within " local limits which it had thought fit to define, and had " provided for compensation to those who might be there- " by injuriously affected (in such cases and under such " conditions as it might have prescribed) the present case " might have been like *Rex* v. *Pease* and *The Hammer-* " *smith Ry. Co.* v. *Brand.* No person outside the statutory " line of compensation, even if the use of the asylum in " the manner authorized by the statute had been pro- " ductive of serious damage to him, could then have " obtained any relief or remedy, upon the footing that " what the statute authorized was a legal nuisance to " himself, or in itself an actionable wrong. But the case " is different when (as here) no interference with private " rights is authorized, and no place or limit of space is " defined within which the establishment of such an " asylum is made lawful. (per Lord Selborne p. 201.)

" The question, as I think, is whether there is an inten- " tion shewn on the part of the legislature to authorize " the erection of an asylum where it is a nuisance to " owners of the adjoining property, if the Poor Law " Board thought it a fit place, either mistakenly thinking " that the asylum would be no nuisance there, or, per- " haps rightly, thinking that there was no other place in " which it could be erected without being a greater " nuisance than if erected there."

" It is clear that the burthen lies on those who seek to

" establish that the legislature intended to take away the " private rights of individuals to show that, by express " words, or by necessary implication, such an intention " appears (per Lord Blackburn pp. 203-208).

" I do not think that the legislature can be held to " have sanctioned that which is a nuisance at common " law, except in the case when it has authorized a certain " building in a specified position, which cannot be so " used without occasioning nuisance, or in the case where " the particular plan and locality not being prescribed it " has imperatively directed that a building shall be pro- " vided within a certain area and so used, it being an " obvious or established fact that nuisance must be the " result. In the latter case the onus of proving that the " creation of a nuisance will be the inevitable result of " carrying out the directions of the legislature, lies upon " the persons seeking to justify the nuisance.

" Their justification depends upon their making good " these two propositions; in the first place, that such are " the imperative orders of the legislature; and in the " second place, that they cannot possibly obey those " orders without injuring private rights. If the order of " the legislature can be implemented without nuisance, " they cannot, in my opinion, plead the protection of the " Statute; and, on the other hand, it is insufficient for " their protection that what is contemplated by the " statute cannot be done without nuisance, unless they " are also able to shew that the legislature has directed it " to be done. Where the terms of the statute are not " imperative, but permissive, where it is left to the dis- " cretion of the persons empowered to determine whether " the general powers committed to them shall be put into " execution or not, I think the fair inference is that the " legislature intended that discretion to be exercised in " strict conformity with private rights, and did not " intend to confer license to commit nuisance in any " place which might be selected for the purpose."

" It is clear that they acted in honest belief that all " they did was for the benefit of the community and

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" within their statutory powers. But that would not avail " if the act does not enable either or both in conjunction " to erect an asylum to the nuisance of neighbouring " proprietors. These powers appear to me to be from the " first to last permissive and not imperative. Whether " they shall be exercised at all, and if so, to what extent " and effect their exercise shall be carried, is left to the " discretion of the Local Government Board."

(Per Lord Watson pp. 212-215.)

It would be difficult to find a case more exactly parallel to the case before this Court than the case just quoted. The remarks of their lordships above cited dispose at once and finally of the greater part of the respondents' pretensions, and also dispense with the consideration of much of their proof. The powers of the respondents, like those of the appellants in the case cited, are, in the words of Lord Watson, " from first to last permissive, not imperative."

The character and natural destination of the properties affected by the asylum have first to be considered, for on these depends largely the effect which will result from its erection. On this point, there is no divergence of opinion.

The site of the appellants' properties is one of great natural beauty, on the bank of the river St. Lawrence, overlooking the Lachine Rapids, removed from manufactories or objectionable buildings of any kind, and yet within easy driving distance of the City of Montreal, and fronting on a fine highway.

The house on the property of the appellant Crawford is a country gentleman's residence of the first class, with all the corresponding outbuildings and appurtenances, and the property of appellant Hadley, while actually used for farming purposes, has been held, for many years, in common with all the neighbouring properties, with the view of ultimately becoming a site for similar villa residences, all the property in the vicinity being held by large land owners who can afford to keep it for that object.

The site of these properties is described as one of the finest for private residences, or villas, out of town residences, on the Island of Montreal.

The character of the properties affected being thus established, the general effect of the erection of the respondents' asylum on these properties is to be considered.

On this point again, the evidence is unanimous. The general effect of the presence of an insane asylum will be to ruin the appellants' properties for residential purposes, and to depreciate their market value to an enormous extent.

Lacoste, Q. C., and *L. H. Davidson*, Q. C., for respondents:—

The judgment of the Court below is so thoroughly well founded in law and in accordance with the evidence as to require no further argument in its support; and respondents, therefore, will content themselves with simply restating shortly the points which it seems to them arise under the pleadings in this cause.

The respondents submit:

1st. That the existence of a hospital for the care and cure of the insane, apart altogether from statutory provisions, is not *prima facie* a nuisance; that is, such an undertaking or institution does not fall within the class of things recognized as a nuisance, either public or private. But in any event the powers granted to the respondents by the Act of incorporation must necessarily include what would be required to enable them to fulfil the purposes for which they were incorporated, and such purposes necessarily involve the purchase of ground and the erection of buildings necessary for carrying on the work of such an institution. Having such incorporation, it is still less possible to regard either the existence of such institution or the carrying on of its work as a public nuisance, as it is alleged by plaintiffs to be.

Respondents do not deny that it might be possible that a nuisance might follow either upon the manner in which the buildings were proceeded with, or the work was carried on after their erection; but neither of such grounds

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are, or could be, invoked in plaintiffs' declaration; and therefore, *prima facie*, the plaintiffs' action is unfounded, there being no demand for any direct or actually suffered damage.

Assuming that the respondents were in the exercise of their rights and were acting within the powers conferred upon them, it is submitted the plaintiffs could only have an action for *actually suffered* damage, resulting from an exercise of such powers in an *improper* and *careless* manner.

Wood on Nuisance, p. 869.

And that mere fear of injury arising in the future would not entitle them to bring either an action by way of damages or for an injunction.

Even if there were any foundation for the pretention of plaintiffs that the hospital is a nuisance and that the extraordinary powers of the Court could be invoked for its suppression, two further questions arise (1) whether the charge being that the hospital is a *public nuisance* plaintiffs have any right of action without the intervention either of municipal authorities or of the Attorney General of the Province.

But (2), supposing reasonable cause to exist for the fears of plaintiffs and a personal right of action to be good, it would remain within the discretion of the Court whether under the circumstances of this case, and having regard to the injury which would necessarily be done to those for whose benefit the institution is intended, an injunction should be issued at this stage.

March 21, 1891.]

DORION, C. J. (for the Court) :—

The appellants, who were the plaintiffs in the Court below, are the owners of two properties situate at Verdun, on the Lower Lachine road. The Protestant Hospital for the Insane was incorporated in 1881 for the purpose of erecting and maintaining an asylum for the insane. They acquired a property on the Lower Lachine Road, bounded on one side by Hadley, one of the plaintiffs, and on the

other side by a property which that of Crawford, the other plaintiff, adjoined. Hadley is the immediate neighbour on one side, and Crawford is the second neighbour on the other side, the distances being 1,200 and 1,500 feet. Immediately after purchasing the property, the governors of the asylum began the erection of a building. The plaintiffs instituted proceedings in the nature of an injunction to enjoin the corporation from proceeding with the work of construction, on the ground that their works were a public nuisance, and a source of injury and damage to the plaintiffs, and that the asylum would change the character of the adjoining properties, and depreciate them in value. They prayed that the defendants be ordered to desist from the erection of the asylum. There is no claim that damage had been suffered, or that the works then created a nuisance. This action was met by a demurrer, which was dismissed, and properly dismissed, and there is nothing to be said upon that.

Then the defendants pleaded to the merits, denying that any injury would be caused by the building, etc.

It is a well known principle that a proprietor has a right to use his property as he pleases so long as he does not prejudice his neighbours. The whole difficulty is this: Were the defendants using their rights without prejudicing the rights of the adjoining proprietors? All the circumstances have to be weighed in order to determine whether the party has committed a nuisance against his neighbour. In an English case, which went to the the House of Lords (*Metropolitan Asylum Board of Works* v. *Hill*, L. R. 6 Ap. Ca. 193), a Board was specially authorized by law to erect an institution for smallpox patients. They erected an asylum at Hampstead, and when sued for a nuisance they answered that they were authorized by law. The House of Lords decided that it was not an authorization to erect an asylum at a particular place; that the authority was general, and that they might be held liable for a nuisance. The Court here is of opinion, therefore, that the mere passing of an Act authorizing the erection of an asylum is not a justifica-

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tion if the asylum is really injurious to the property of the neighbours. The Judge in the Court below went too far in holding the Act to be a sufficient answer to an action for a nuisance. Now, what is a nuisance? Is every injury to the property of a neighbour such an injury as would justify the neighbour in calling for an abatement of the nuisance? The English and French law does not differ much in practice; but there is a difficulty in dealing with these questions under the French law, because in France establishments which are dangerous, inconvenient or insalubrious are subject to special regulations. When an establishment shown to be dangerous has been established after the usual formalities, the Courts in France have no right to order the abatement of the nuisance. The party aggrieved has his remedy for damages, but he cannot have the building destroyed. The Court will therefore principally allude to the English authorities on the subject, as the French cases are embarrassing, owing to the special regulations referred to. There are certain establishments which may be considered nuisances in themselves. An illegal establishment is a nuisance, and a right exists to compel it to be closed. An insane asylum is not an illegal establishment; on the contrary, it is specially authorized by the Act of incorporation. The definition of nuisance given by Lord Justice Knight Bruce in 1867 has been generally followed since. If an inconvenience is caused to a neighbour, to what extent must that inconvenience go to be a nuisance? His lordship held that it must be something more than a fanciful injury. It is not enough that it is contrary to dainty or delicate modes of living. It must be something opposed to plain and ordinary modes of living; everything that interferes with the physical comfort of existence will be considered a nuisance. In the *Hill* case, first alluded to, there was a jury trial. The jury were asked whether the hospital was a nuisance, and they answered yes; so that there was no question in that case about the fact, as the jury had settled it.

The current of the authorities is that however useful an

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institution is, if it is detrimental to the neighbours it may be ordered to be destroyed. But it is perfectly well known that a person has a right to build on his own land. If he puts up a huge barn which shuts out his neighbour's view, there would be no claim to damages on that account. The mere fact that he has put up a building which depreciates the value of the adjoining property does not constitute a nuisance. Here the action was brought when the foundations were laid. There could be no injury to the neighbours at that time. It was not proved that any injury would necessarily result. At the time the action was brought there was only an expectation or fear that the value of the adjoining property would be affected. After the best consideration we have been able to give to the case, we find that this institution is not prohibited by law; it is recognized as legal and proper. If the fact that the neighbours did not like this institution was sufficient to cause it to be closed, the half dozen hospitals in the City of Montreal would have to be closed, because they are all more or less injurious to the persons owning property in the vicinity. It cannot be denied that Mr. Crawford would suffer by the erection of this hospital. But so does a person in the city who builds a fine house, and next year finds that some one has put up a butcher's shop or a livery stable opposite him. These establishments are not prohibited, and provided they are kept clean and free from noxious odors they cannot be interfered with. An establishment may become a nuisance from the mode in which it is carried on. There is no evidence to show that any inconvenience has been caused by the hospital for the insane, and the action must be held at least premature.

We confirm the judgment, but modify the reasons assigned by the Court below.

The judgment of the Court reads as follows:—

"The Court, etc.....

"Considering that the appellants have instituted their action against the respondents, in the nature of an in-

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junction, to compel said respondents to discontinue the erection of buildings which they had commenced for the purpose of establishing an hospital for the insane, alleging that such hospital would be prejudicial to them, and will diminish considerably the commercial value of their lands in the immediate vicinity, by exposing them and their families to inconveniences in the enjoyment of their property, and to dangers from diseases by the collection of a large number of patients, and also by the corruption of air, and of the waters in the St. Lawrence and St. Pierre rivers, by the drains from such establishment;

"Considering that the defendants have pleaded that in beginning the construction of the buildings complained of, they were only exercising a right, and causing no injury to the appellants;

"And considering that the appellants have failed to prove that the said asylum, under the circumstances in which it is being erected, is causing or likely to cause any injury to the properties of the said appellants, or any diminution of the value of the said properties, owing to causes for which the said respondents would be liable, and that the said buildings are erected for a legal and proper object, and that the appellants cannot, for any of the causes established in evidence, compel the said respondents to discontinue the erection of said buildings;

"This Court doth confirm the judgment rendered by the Superior Court on the 3rd of April, 1889, and doth dismiss the action of the appellants with costs, as well in the Court below as in this Court, said costs to be taxed in this Court, as in a cause of the first class."

Judgment confirmed.

N. T. Rielle for appellants.

Davidson & Ritchie for respondents.

(J. K.)

March 26, 1891.

Coram CROSS, BABY, BOSSÉ, CIMON, JJ.

LOUIS H. PIGNOLET,
(*Defendant in Court below*),
APPELLANT;

AND

DOLPHIS C. BROSSEAU,
(*Plaintiff in Court below*),
RESPONDENT.

Lessor and lessee—Change of destination of premises leased—Resiliation of lease—Art. 1624, *C.C.*

Where premises were leased "to be used and occupied only for the "purposes of concerts, lectures, fairs, bazaars, clubs, societies, public "exhibitions and meetings in accordance with law," and the lessee sublet to parties who used the premises for the religious meetings of the Salvation Army, an organization which was obnoxious to a large portion of the inhabitants of the locality, and windows were broken and other damage was done to the property in consequence, and insurance was refused by the insurance companies on account of the increased risk, *held*, that there had been a change of destination sufficient to entitle the lessor to obtain the rescission of the lease.

APPEAL from a judgment of the Superior Court, Montreal, (DOHERTY, J.), April 21, 1888, maintaining the respondent's action for the resiliation of a lease. The judgment reads as follows:—

"The Court, etc.....

"Considering that plaintiff hath proved the material allegations of his declaration in this cause, and that defendant is using and permitting his subtenant to use the premises leased in question in this cause in such manner as to cause waste and depreciation of the value of said premises to an extent far beyond ordinary wear and tear of leased property; and considering that said property is still being used to the knowledge of defendant in such an unusual and dangerous manner as to increase the fire risk and so prevent plaintiff being able to insure said property; said insurance being refused by the insurance

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companies on account of the increased danger from such usage which was not contemplated at the time of leasing to defendant as alleged by plaintiff;

"And considering that said property has been and still is being disfigured and depreciated in appearance and value by barricading and blocking up the windows thereof so as to give to the same a dilapidated ruined appearance, and that plaintiff has been notified and threatened by his adjoining tenants that they will leave his adjoining property on account of the bad effect of such usage as aforesaid;

"Considering that for these and other reasons alleged and proved of record the plaintiff is entitled to the conclusions of his declaration and the cancellation and expulsion thereby claimed, and that defendant hath failed to make good defence to this action, dismissing his plea thereto, doth quash, annul and resiliate *à toutes fins que de droit* the lease *sous seing privé* entered into between the said parties at Montreal, on the 31st of December, 1887, of the following premises, to wit: That certain hall about thirty feet by ninety feet and appurtenances, on the second floor of the building at corner of Champ de Mars street, known and designated as No. 39 Bonsecours in said City, and doth condemn the defendant within three days after service upon him of this judgment to give up and abandon to plaintiff the entire possession of said premises by vacating the same, and in default of said defendant so doing within said delay, it is ordered that he and his subtenants be expelled therefrom under the authority of this Court, the goods and effects found therein *mis sur le carreau*, and the said plaintiff placed in the peaceable possession and enjoyment of the said leased premises, the whole with costs *distraits*, etc."

The material portion of the lease was as follows:—

"This contract of lease witnesseth, that Mr. Dolphis Camille Brosseau, of the city of Montreal, merchant, as lessor doth hereby lease, and that Mr. Louis Henri Pignolet, of the same place, advocate, as lessee doth hereby hire

that certain hall about thirty feet by ninety feet as at present fitted up and appurtenances on the second floor of the building at the corner of the Champ de Mars street, known and designated as No. 39 Bonsecours street in said city, for the term of two years and four months commencing on the 1st day of January (1888) next, upon the following reciprocal stipulations, at the yearly rent of $300, current money of this Province, payable in equal and successive monthly payments of $25, commencing on the 1st of January next, to be used and occupied only for the purposes of concerts, lectures, fairs, bazaars, clubs, societies, public exhibitions and meetings in accordance with law;

"The lessor hereby undertakes and assumes all risk of damage and destruction of the property by fire, and agrees to indemnify himself against such loss and damage to the property by insuring the same against such risk to the complete exoneration of the lessee from all responsibility therefor, provided, however, that no illegal act or gross negligence in the care of the property, affecting the contract of insurance, is proved against the lessee, any law or usage to the contrary notwithstanding."

Jan. 22, 1891.]

The case was submitted on the factums, without oral argument.

The principal question was whether the conversion of the hall into a place for the religious meetings of the Salvation Army was a change of destination not contemplated by the lessor, and sufficient to justify the cancellation of the lease, seeing the damage done to the property, and the fact that the insurance companies refused any longer to insure the property. In summing up the argument the appellant submitted:—

Que l'immeuble en question n'a pas été détérioré par lui, ni par ses sous locataires, ni par d'autres personnes dont il devait répondre;

Que les chassis de cet immeuble ont été brisés par des *personnes du dehors* hostiles aux sous locataires de l'appelant et sans provocation;

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Que des planches ont été mises temporairement dans les chassis pour les protéger et empêcher les ennemis de l'armée du Salut de les briser;

Que ces planches n'ont pas déprécié la propriété en question;

Qu'il aurait suffi de les enlever pour la rendre telle qu'elle était;

Qu'il y avait des planches dans un ou deux chassis de cette salle avant que l'armée du salut y tint ses assemblées;

Que cette propriété est située dans un mauvais voisinage et est entourée d'estaminets, d'une écurie de louage et de magasinets;

Que la salle dont il s'agit a été occupée comme caserne, manufacture de moulures, entrepot, manufacture de vinaigre, théâtre, avant qu'elle fut loué à l'appelant;

Que l'appelant l'a occupée conformément aux conventions de son bail et n'en a pas changé l'apparence;

Qu'il n'en a pas changé la destination en la sous louant à l'armée du salut;

Que l'armée du salut est un corps religieux enseignant le pardon des pêchés par le repentir et le sang de Jesus-Christ;

Qu'à ce titre ses membres ont droit à la protection des lois;

Que l'ordre a toujours régné dans ses assemblées dans l'intérieur de la salle;

Qu'aucun désordre de nature à autoriser la résiliation du bail n'a eu lieu dans l'intérieur de la salle;

Que les violences et les désordres qui ont eu lieu en dehors de la salle, dans la rue, ont eu pour auteurs les gamins qui poursuivaient et pourchassaient l'armée du salut, et cela sans provocation de la part de ses membres qui ne pouvaient pas les en empêcher;

Que l'armée du salut ne se composait que d'une douzaine de femmes et de deux hommes;

Qu'elle a pris toutes les précautions voulues pour assurer la paix et prévenir tout désordre.

L'appelant pour toutes les raisons qu'il a données croit

erroné le jugement qui a mis de côté sa preuve et ses prétensions pour admettre celles de l'intimé et casser le bail signé par eux.

The respondent submitted:—

Il s'agit en cette cause pour un propriétaire de faire disparaître une nuisance publique, qui est une source de troubles et de danger pour le voisinage et que le locataire a établi dans la maison louée, au grand danger et péril du propriétaire.

C'est le devoir de chaque citoyen d'agir dans l'intérêt commun pour la répression de ce qui trouble l'ordre et la paix publics.

Denisart, Vo Ministère public.

Domat (Remy) vol. 4, p. 460.

Institutes de Justinien par Ferrière vol. 6, pp. 299-331.

Blackstone liv. 3, ch. 13. Tout ce qui nuit illégalement à un autre ou cause du dommage à un autre est une nuisance; le recours est une action par laquelle non seulement sont recouvrés les dommages, mais la nuisance elle-même est enlevée. 2 East 154. 2 Starkie. Ev. 317, 3e Ed.

Sedgwick, on Damages, p. 146.

Le moindre dommage est suffisant pour autoriser l'action privée. Hilliard, on Torts, vol. 1, p. 555 No. 2.

Hight v. *Thomas*, 10 Ad. & Ellis, 590.

Pierce v. *Dart*, 7 Cowen, 611.

Larombière, Oblig. vol. 5, p. 715.

Merlin, Quest. V *bis*. question d'Etat § 1.

Mangin, act. pub. T. 1, p. 252.

Dans le cas actuel le propriétaire se plaint de son locataire et lui impute de faire des actes nuisibles à la propriété louée et au voisinage. Proudhon Dom. public vol. 3, p. 37 *et seq.* dit: "Il est défendu à tout particu-"lier de rien faire dans un lieu public qui puisse causer "du dommage à des tiers."

Curasson, des Actions possess. p. 367.

Laurent, Pr. du dt. civ. vol. 7, p. 402 et suiv.

Aubry & Rau, vol. 3, p. 56 *et seq.*

Demolombe, Des Servit. vol, XI. p. 230 *et seq.*

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Bourdon & Benard, 15 L. C. J. p. 60.

L'intimé appuie sa demande sur l'article 13 du code de proc. civile et sur les art. 1624-1626 à 1629 incl. du C. C.

Par l'Art. 13 du code de proc. et les autorités ci-dessus citées, il est démontré que l'intimé a un intérêt suffisant en loi pour demander la résiliation de son bail et la cessation de la nuisance publique causée par l'appelant et ses représentants.

Les art. 1626 à 1629 établissent les devoirs et obligations des locataires, et l'art. 1624 reconnait le droit d'action sommaire de l'intimé.

L'intimé est exposé non seulement aux dommages déjà soufferts et continus, mais à en souffrir d'autres irréparables par l'incendie de la bâtisse louée. L'appelant tient par son fait l'intimé constamment exposé à perdre totalement la bâtisse louée.

Duvergier, Louage No 448, Lepage, Lois des bâtiments, p. 179.

Curasson, Compet. t. 1, p. 434, No 19 2e Ed.

Massé et Vergé, sur Zachariæ t. 4, § 702 note 5.

Cass 20 ou 26 Déc. 1858. S. V. 60-1-66-P. 59. 1622-D. P. 59-1-136.

March 26, 1891.]

CROSS, J. (*diss.*) :—

The appeal is from a judgment which maintained an action to annul a contract of lease, on the ground that the lessee had violated some of the obligations he had incurred as lessee, in hiring a hall from the respondent. The hall or room was about 30 x 90 feet, on the second floor of a building, No. 39 Bonsecours street, occupied by the lessor as a vinegar manufactory. The premises were leased to the tenant by the respondent for the term of two years and four months, from 1st of January, 1888, at a rent of $300 per annum, and according to the terms of the lease, were "to be used and occupied only for the "purposes of concerts, lectures, fairs, bazaars, clubs, "societies, public exhibitions and meetings in accordance "with law." Also, according to the terms of the lease,

"the lessor hereby undertakes and assumes all risk of "damage and destruction of the property by fire, and "agrees to indemnify himself against such loss and dam- "age to the property by insuring the same against such "risk, to the complete exoneration of the lessee from all "responsibility therefor, provided, however, that no ille- "gal act or gross negligence in the care of the property, "affecting the contract of insurance, is proved against "the lessee, any law or usage to the contrary notwith- "standing."

The lessee agreed on his part "to deliver up the said "property to the lessor at the expiration or sooner deter- "mination of said term in as good condition as at the "commencement thereof, reasonable wear, deterioration "by age, and loss and damage by fire (as above stipulated) "expressly excepted." The lessee also agreed "that the "said leased property is not to be used for the purpose of "selling or dispensing alcoholic or intoxicating liquors, "or for any purpose contrary to law or good morals."

The appellant sub-let the premises on the same conditions to a religious organization known as the "Salvation Army," and it appeared that owing to the hostility which existed in the neighborhood to such meetings a number of the panes of glass were broken by projectiles thrown from the outside.

The Court below. held that the sub-tenant violated the obligations of the contract of lease by using the premises in a way to cause waste and depreciation of its value to an extent beyond ordinary wear and tear. And that by blocking up the windows the subtenant disfigured the property, giving it a dilapidated and ruined appearance which greatly affected its value. And that insurance was refused by insurance companies on account of the increased danger from such use, which was not contemplated at the time of the lease. The action to annul the lease was maintained, and this judgment was confirmed by the Court of Appeal.

The facts which the controversy involves are substantially as follows :—The room in question had been origin-

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ally fitted up as a public theatre, but was leased for holding meetings, concerts, etc., and was sub-let by Pignolet to the Salvationists for the like purpose. I find no ground for the objection that there was a change of destination. The obligation to furnish (if any) was on the part of the lessor not the lessee. It is not the custom, neither is it consistent with the nature of the circumstances, that such a room should be furnished by the lessee, besides which the landlord was secured by a month's rent in advance. The tenant also put in a stove of the value of more than a month's rent and got sundry planks to protect the windows, besides which, although not bound to do so, by the plea, the appellant offered to give additional security; so that not furnishing the premises was not a ground to annul the lease, nor was such seriously contended.

The Salvation Army is a religious organization, professing high aims with regard to the regeneration of the world in its religious aspect; they make processions in the streets accompanied by a band of music to invite people to attend their religious exercises consisting of address, singing of psalms, and prayer, for the purpose of calling to repentance and asking forgiveness of sins; they interfere with no person's religious faith or belief, but urge their adherents to follow and practice the principles of Christianity. At their meetings there are usually no greater number of their members present than five or six men and twelve or fifteen women. Their meetings are therefore as regards themselves of an eminently peaceful character. They are, however, not popular with a certain class, by whom they are sometimes attacked when in procession, by stones and other missiles, and some of the persons thus hostile to them, enter and mix with the rest of their congregation, for the purpose of creating a disturbance and interrupting their religious exercises. The hostility does not rest here, but their assailants threw stones into their windows, breaking the glass, while parties inside created disorder in order to interrupt the religious exercises. Those creating disturbance were promptly

put out, and to protect themselves from the outside violence the windows were barricaded with planks while shutters were ordered for the same purpose at the expense of the Salvationists. The damage done to the property was on the whole trifling, and was not done by the Salvationists or any of their adherents, but by hostile outsiders.

The first question is, whether the occupants, the Salvationists, were within the terms of their lease? They were holding meetings clearly within the terms of their lease, for these meetings were as regards themselves eminently peaceful and lawful.

Second.—Were they responsible for the violence used? To my mind they were clearly not responsible for such violence, and while within the law, in the exercise of their rights they were entitled to the protection of the law against all wrongdoers. If the Courts held otherwise they would be adopting the law made by the mob and making themselves the instruments of oppression and injustice in place of being protectors of the innocent.

As regards the refusal of insurance companies to insure the premises, the lessor had himself undertaken this risk by the lease, and in any case, no responsibility in this respect could attach to the lessee; he had promised to pay extra premiums for extra risk, and in order to have been held for any liability in the matter of insurance, he should have been notified of the difficulty and asked to provide against it, which was not done. As to the pretended depreciation in value of the premises, no such is proved. But the pretension is that the presence of the Salvation Army did depreciate the property. Admit this for the sake of argument, it would, at least, be an injury for which there is no legal remedy—a "*damnum absque injuria*," one that frequently takes place respecting property in particular localities. Property becomes raised or depressed in value by the erection of a butcher's stall, by the establishment or the removal of a public market, or of a church or of a public square; but no legal remedy results therefrom, nor would any arise from the pretended

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disfigurement of the building, if this ground had any foundation as to fact, which it had not. The planks in the windows were placed to protect from violence; the act of the tenant in placing them there caused no damage to the lessor of any significance, and was being voluntarily restored by the act of the tenant. I do not mean to say, if there had been proved any substantial damage to the building caused by the acts of the tenant, that such a damage would not have been esteemed a depreciation, but there was no room for such a pretension.

There appears to be in the neighborhood of the room in question a number of saloons whose keepers and habitués would not be very likely to be favorable to religious revivals, and where the existence of such a class of persons would most likely be found standing in need of Christian influences, and most difficult to be reached by the ordinary methods. If the occupation of premises there, in the view of effecting a spiritual and moral regeneration, is a cause for annulling the lease, then the Salvationists are condemned and lose the benefit of their civil contract because they are Salvationists. And, however sincere is the view taken by the judgment (and although the very opposite may be intended) to my mind, it operates as a practical persecution of the Salvationists by a refusal of the protection of the law, and by the endorsement by authority of the acts of violence by which justice is defeated, and civil rights are ignored. It is vain to say, as the judgment does, that the sub-tenant used the premises in a way to cause waste and depreciation of value, while if there had been any such it proceeded not from the sub-tenant, but was the act of the violence practised by outsiders wholly against the will and in spite of the desire of the sub-tenant. This mode of putting down by violence incipient religious or popular movements is not new, and has been sometimes successful when sympathized in by those in power, as was the case at Alexandria in the early ages of the Church. It was attempted in England in the case of the Wesleys and the Quaker, William Penn, but good sense ultimately prevailed, and

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the Wesleys were protected from violence in their religious exercises. Their efforts have resulted in a great religious reform. At this date no names than theirs are more venerated in all England, and even by the most distinguished prelates of the Church of England. I am no advocate of the methods of the Salvation Army, but consider, that while they violate no law, they are entitled to freedom of action in putting forward their schemes for moral and religious improvement. It seems to me that if let alone, they can do no harm, and may effect a little good, but, if coerced and unfairly treated they will be strengthened into importance by the sympathy which such treatment will gain for them, and if they come to be extinguished by harshness who knows but that a phœnix might arise from their ashes to reverse the verdicts by which they had been crushed.

The persons who have lent countenance to the obstructions thrown in the way of the organization seem to look upon it as a disreputable organization. This is a mistake. Already it has acquired a vast array of members and adherents, and the plan of its General, sometime since propounded, for the amelioration of the condition of the poor in the large cities of Europe, has engaged much discussion in the press of these different localities. And even in this Dominion the daughters of the highest in the land have thought it no disgrace to be enrolled in its ranks and to become practical laborers in its mission of peace and goodwill. It is quite in a position to claim the protection of the law and to assert its rights.

I think the judgment of the Superior Court annulling the lease should be reversed and the action dismissed.

CIMON, J. :—

The case was submitted to the Court on the factums only. The factum for the appellant has been framed with considerable skill, but we have to treat the case as one of contract. The lease of the premises was for certain purposes named therein. The real question is whether there has been a change in the destination of the pre-

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mises which justifies the lessor in demanding the resiliation of the lease. We think the plaintiff has made out his case. The premises were leased for public meetings, etc. The lessee has converted the building into a place for religious meetings. Is not that a change of destination? I would give the same judgment if the hall had been converted into a Roman Catholic chapel.

Bossé, J.:—

I see in this case only the relation of lessor and lessee. Brosseau's only interest is to protect his property. He leased his premises as a hall for general meetings, not as a place for religious worship. If any other religious association had occupied the place, and the same trouble had occurred, the result would be the same. The windows of the building were broken, the furniture damaged, and the insurance companies refused to continue the insurance. We cannot deny to the lessor the right to protect his property. This is a matter altogether apart from the question whether the objects of the Salvation Army are good or bad.

Judgment confirmed.

St-Pierre, Globensky & Poirier for appellant.

Girouard & de Lorimier for respondent.

(J. K.)

May 23, 1891.

Coram DORION, C. J., BABY, BOSSÉ, DOHERTY, CIMON, JJ.

THOMAS McGREEVY,
(*Defendant in Court below*),
APPELLANT;

AND

GEORGE BEAUCAGE,
(*Plaintiff in Court below*),
RESPONDENT.

Pleading—Vagueness and insufficiency of allegations of demand—Exception to the form—Appeal.

HELD:—1. Where the right of action is not denied by the defendant, but he complains of the vagueness and insufficiency of the allegations of the declaration, it is matter for an exception to the form, and not for a demurrer, or for a motion for particulars.

2. An interlocutory judgment rejecting an exception to the form in such case is susceptible of appeal, being a matter which cannot be remedied by the final judgment.

APPEAL from an interlocutory judgment of the Superior Court, Montreal (DAVIDSON, J.), March 18, 1891, rejecting an exception to the form filed by the defendant. The judgment reads as follows:—

"La Cour, après avoir entendu les parties sur l'exception à la forme par le défendeur;

"Considérant que la dite exception à la forme est mal fondée;

"Renvoie la dite exception à la forme avec dépens distraits à Mtre. J. L. Archambault, avocat du demandeur, laissant au défendeur son recours pour particularités ou par demurrer."

On motion of defendant leave to appeal was granted.

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E. Lafleur, for appellant:—

It will be seen that the defendant is charged in the 7th paragraph of the declaration with having been guilty

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of false representations and fraudulent manœuvres with the connivance of divers persons interposed, and of having thereby caused the plaintiff to lose the contract for which he tendered, and that the 9th paragraph of the declaration reiterates this charge in almost identical language. Neither of these paragraphs specifies when, in what manner or upon whom the alleged fraudulent manœuvres and undue influence were exercised, or when, in what manner, under what circumstances, and to whom the alleged false representations were made. Further, these allegations do not clearly specify the persons alleged to have been interposed, or the manner in which these persons are charged with having connived with the defendant in making such false representations. Nothing can be vaguer than these charges, and as they form the very gist of the action, it is quite impossible for the defendant to know how to plead to such indistinct and vague accusations; nor can the defendant, by any possibility, foresee what kind of evidence is intended to be offered in support of such charges, as the declaration opens the door to almost any kind of statements which the plaintiff's witnesses may choose to make.

The 11th paragraph of the declaration alleges that the defendant received an amount of at least $5,000 "for the "purpose of indemnifying the plaintiff for the loss of his "contract, and also as a consideration for the obtaining "by him by means of the manœuvres and other acts "hereinabove alleged, the withdrawal of the plaintiff's "tender, and for having succeeded in making the same "fall to the ground, and that he has otherwise benefited "and profited to the amount of at least the said sum "which he has applied to his personal profit and use." Comment upon this allegation is almost superfluous. It specifies no time, place or circumstances in connection with the alleged payment of this sum of money, and the two main allegations contained in this paragraph are in complete contradiction with each other. The plaintiff asserts that the defendant received a sum of "at least $5,000 for the purpose of indemnifying the plaintiff,"

and in the same breath alleges that the same sum was received by the defendant as a consideration for his obtaining the withdrawal of the plaintiff's tender by the manœuvres previously referred to. In other words, the plaintiff has charged that the defendant received the money to be handed over to the plaintiff, and immediately after contradicts this by stating that he received the money to keep for himself. Which of these statements the plaintiff intends to offer evidence upon at the trial, it is impossible to surmise; and even if he restricts himself to one of these allegations, the charge would be so vague as to make it even then impossible to meet it. The same paragraph goes on to allege that the defendant has "otherwise" benefited and profited to an amount of at least the said sum. It is enough to state such allegations in order to show how utterly insufficient they are to enable the defendant to prepare his defence and to go to trial.

The Honorable Judge in the Court below rejected the exception, on the ground that the defendant's proceeding should have been by demurrer or by motion for particulars.

The appellant submits that the normal and regular method of complaining of defects in a declaration, such as those above adverted to, is by exception to the form. Nothing seems to be better established in our jurisprudence than the doctrine that matter essential *omitted* gives rise to a demurrer, but matter essential *imperfectly stated* gives rise to an exception to the form.

Wagner v. *Farran*, 3 R. de L. 196; K. B. 1812.

Boucher v. *Fraser*, 9 R. L. 718; Q. B. 1875.

Walker v. *Mayer*, etc., 5 R. L. 66; 2 L. C. L. J. 22, Q. B. 1866.

Birch v. *Desjardins*, 11 R. L. 468, S. C. R. 1882.

Possibly the defendant might have obtained particulars upon a motion to that effect, and indeed such a motion was filed by the defendant within four days of the return of the writ, with a notice that the same was filed under express reserve of the exception to the form already filed, and that it might be presented thereafter if occasion

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required; but the defendant considered and still considers that the defects contained in the declaration in the present cause were so grave as to justify the dismissal of the action, saving the plaintiff's recourse, and he consequently proceeded by exception to the form.

When the present appellant moved this Court for leave to appeal from the interlocutory judgment dismissing his exception, two of the judges of this Court expressed the opinion that the appellant had taken the proper procedure by exception to the form, and that the defects of the declaration were such as to involve the dismissal of the action if no amendment were applied for, and gave an intimation that, if the appeal were taken, it would in all probability be maintained and the action dismissed.

The respondent has not seen fit to act upon the suggestion of this Court, and has made no application to be allowed to amend his declaration, and the appellant is therefore compelled to bring the present appeal to a hearing and to press for the reversal of the judgment dismissing his exception to the form.

It is obvious that this judgment is not one that could be remedied by the final judgment in the case, as the defendant would be placed at an immense disadvantage if he were compelled to plead and go to trial upon the charges and accusations contained in the declaration. The defendant's only recourse is to ask for the dismissal of the present action, saving the plaintiff's recourse if he chooses to re-model his declaration and formulate the charges with enough precision to enable the defendant to defend himself.

J. L. Archambault, Q. C., for respondent, submitted that the allegations of the declaration were sufficiently explicit to enable the defendant to enter upon his defence.

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CIMON, J. (for the Court) :—

C'est un appel d'un jugement de la Cour Supérieure déboutant l'exception à la forme produite par le défen-

deur. Je suis chargé de prononcer le jugement unanime des cinq juges.

Beaucage poursuit McGreevy pour $5,900. La déclaration est bien longue, très-difficile à comprendre à cause de ses contradictions et de ses ambiguités, mais en voici le résumé, en lui donnant l'interprétation la plus favorable dans le sens du demandeur; elle allègue: que le demandeur (Beaucage) est entrepreneur de travaux publics et privés; que le défendeur (McGreevy) "est aussi "contracteur public et qu'il a été dans l'habitude depuis "nombre d'années d'entreprendre des travaux publics et "de faire des soumissions pour les dits travaux, soit seul, "soit en société avec d'autres personnes;" que les commissaires du havre de Québec, agissant pour et au nom du gouvernement du Canada, ont, en 1883, demandé des soumissions "pour entr'autres travaux la construction "d'un mur de travers (cross wall) en rapport avec les "améliorations du port de Québec;" que le demandeur a fait une soumission pour la construction de ce mur de travers (cross wall); que la société Larkin, Connolly et Cie. a aussi fait des soumissions pour les mêmes travaux; que le nommé John Gallagher a aussi produit une soumission; que ce fut la soumission de la société Larkin, Connolly et Cie. qui a été acceptée, et que cette société a fait les dits travaux et touché les subsides votés à ce sujet; que lorsque le contrat pour ces travaux a été accordé à Larkin, Connolly et Cie., le défendeur était membre de la commission du havre de Québec et du parlement fédéral; que Robert H. McGreevy, frère du défendeur, O. E. Murphy et le défendeur avaient des intérêts dans le contrat accordé à Larkin, Connolly et Cie. et en ont bénéficié; que la soumission que le demandeur avait faite était la plus basse et était faite de bonne foi, "mais qu'à "l'instigation du défendeur en cette cause, *par suite de ses "fausses représentations et de ses manœuvres dolosives*, et avec "le concert et la connivence..... de la société Larkin, "Connolly et Cie..... le demandeur fut induit, *sous prétexte d'erreurs, dans sa soumission* OU *de changements dans les "plans et devis à son insu*..... à changer les termes de sa

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" soumission, ce qu'il fit..... avec le résultat qu'il perdit " les avantages et bénéfices de sa soumission et de telle " manière que des trois soumissions..... la soumission de " Larkin, Connolly et Cie. devint la plus basse et fut ac- " ceptée..... et cela au grand préjudice du demandeur " qui ignorait et *a toujours ignoré les actes qu'il reproche* " *maintenant au défendeur pour l'induire et l'engager à changer* " *et abandonner la susdite soumission;*" que le demandeur avait été obligé, pour sa soumission, de faire des dépenses considérables, perdre du temps et des travaux importants où il aurait réalisé des bénéfices; que le changement que le demandeur a fait dans les termes de sa soumission "*ont* " *été le résultat de la surprise et des manœuvres dolosives prati-* " *quées et des influences indues exercées par le défendeur auprès* " *des autres intéressés ci-haut mentionnés*, hors la connaissance " du demandeur, et *des fausses représentations faites vis-à-vis* " *de lui*;" "*que de fait il résulte des diverses déclarations faites* " *par le défendeur en cette cause, en différentes occasions, depuis* " *le ou avant le mois de mai* 1883 *à venir jusqu'à ce jour*, et " notamment de la correspondance officielle soumise au par- " lement..... au mois de mai dernier, laquelle correspon- " dance est consignée dans les archives publiques, et con- " tient divers écrits et documents émanant du défendeur, " que des plaintes sérieuses ont été faites contre le défen- " deur au sujet de son *intervention* indue..... dans l'obten- " tion et l'exécution du contrat pour la construction du " mur de travers (cross wall), et qu'il avait profité de sa " position de membre de la commission du havre de Qué- " bec ainsi que des renseignements qu'il avait pris aux " sources officielles pour s'assurer, tant à lui-même qu'aux " autres personnes ou société de personnes ci-haut men- " tionnées, des avantages indus dans l'obtention et l'exé- " cution du susdit contrat, et cela en fraude de l'intérêt " public..... au grand détriment et préjudice du deman- " deur;" que le défendeur a touché de Larkin, Connolly et Cie., de R. H. McGreevy et O. E. Murphy plusieurs centaines de mille piastres en considération de ses services et de son influence pour faire octroyer le contrat à Larkin, Connolly et Cie., "et notamment qu'il a touché..... par

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" le dit Robert H. McGreevy, son frère, le montant d'au " moins $5,000 courant, *dans le but d'indemniser le dit de-* " *mandeur de la perte de son contrat*, et aussi comme consi- " dération pour l'obtention par lui, au moyen des manœu- " vres et autres actes ci-dessus allégués, du *retrait* de la " soumission du demandeur, *ou* pour avoir réussi de la " faire tomber;" que le défendeur a gardé cette somme de $5,000 pour son profit personnel ; que le défendeur a, à raison des allégations ci-dessus, causé au demandeur des dommages au montant de ces $5,000; "qu'il résulte des " déclarations et promesses réitérées du défendeur que la " dite somme de $5,000 devait être payée et remboursée " au demandeur, tant à l'acquit du défendeur, qui s'y est " personnellement obligé, que pour et à l'acquit des au- " tres soumissionnaires, pour compenser et indemniser le " demandeur de tous dommages à lui causés à raison de " tout ce que ci-dessus allégué, ce que le défendeur a tou- " jours refusé et négligé de faire." Et le demandeur conclut à un jugement contre le défendeur pour ces $5,000 avec $900 pour intérêt depuis 1883.

Telle est l'action. On a pu remarquer qu'une des bases de l'action — c'est que le défendeur a, par des manœuvres frauduleuses et sous de faux prétextes, induit le demandeur à changer les termes de sa soumission, et c'est à cause du changement de ces termes, que le demandeur s'est trouvé le plus haut soumissionnaire et a perdu sa soumission, et de cette perte résultent les dommages qu'il réclame.

Or le défendeur a plaidé une exception à la forme à cette action. Il invoque plusieurs imperfections et des contradictions, qui constituent probablement des moyens à la forme, qui sont tous fondés; mais je ne m'arrêterai qu'au moyen qui consiste à dire que l'action n'allègue pas quelles sont les manœuvres frauduleuses, les fausses représentations, les faux prétextes, les influences indues dont le demandeur se plaint. Comment, avec des allégations générales comme cela, le défendeur peut-il se défendre ou plaider à l'action en connaissance de ce dont on l'accuse ? Ainsi, il ne suffit pas de dire : c'est votre *dol*

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qui m'a fait faire telle chose, mais il faut dire dans l'action en quoi consistait ce dol. Ainsi encore l'action dit : le demandeur fut induit *sous prétexte d'erreurs* dans sa soumission à en changer les termes. Or quelles sont ces *erreurs* que le défendeur a données comme prétextes au demandeur? On ne le sait, et le défendeur ne peut plaider à l'action, ne sachant vraiment pas ce dont on l'accuse.

L'art. 50 du C. de Proc. dit que la déclaration doit être *un exposé des causes de la demande*. Or les *causes* de la demande, ici, sont des *manœuvres frauduleuses, des fausses représentations, des faux prétextes, des influences indues* ; la déclaration devrait donc, en conséquence, contenir un *exposé* de ce qu'ont été, ou de ce en quoi ont consisté ces manœuvres frauduleuses, ces fausses représentations, ces faux prétextes, ces influences indues, etc. Puisque la déclaration en cette cause ne contient pas un tel exposé, elle n'est donc pas conforme aux exigences de l'article 50 C. P. Avec des allégations aussi générales, on voit de suite à combien de surprises et d'incertitudes le défendeur serait exposé.

Or l'art. 51 du C. de Proc. dit que la formalité exigée en l'art. 50 est à peine de nullité ; puis l'art. 116 du C. de Proc. décrète que c'est par exception à la forme qu'on invoque la violation de l'art. 50 du C. P.

Il n'y a pas de doute que c'est ici le cas d'une exception à la forme, et non d'une défense en droit. En effet, on ne nie pas ici le droit d'action, mais le défendeur dit tout simplement au demandeur : vous n'avez pas suffisamment libellé votre cause ou droit d'action de manière à me permettre d'y pouvoir répondre en connaissance de cause.

Le jugement de la Cour Supérieure qui a débouté l'exception à la forme est donc erroné, et cette Cour croit devoir le renverser afin de maintenir cette exception à la forme avec dépens.

Avec cette exception à la forme, le défendeur a produit une motion pour *particularités*, mais cette motion était sans préjudice à l'exception à la forme, et elle n'a pas

encore été présentée pour adjudication. Elle ne peut donc avoir l'effet de préjudicier à l'exception à la forme.

Le demandeur prétend encore que le défendeur n'avait pas l'exception à la forme, mais seulement le droit d'obtenir des *particularités*. Il se trompe. Il est évident que ce n'est pas, ici, le cas de demander des particularités. Cela a lieu quand il s'agit d'un compte fourni en bloc, ou dans le cas de dommages réels réclamés aussi en bloc, ou autres cas semblables. On ne demande pas de *particularités* de manœuvres frauduleuses ou de fausses représentations ; mais on doit donner un exposé de ces manœuvres, de ces fausses représentations, etc. Le défendeur n'avait que l'exception à la forme pour se plaindre de l'absence de cet exposé.

Dernière question: Le demandeur prétend qu'il n'y a pas appel, et il invoque l'art. 1116 du C. de Proc. Cet article est contre lui. Il permet l'appel de tout jugement interlocutoire "lorsqu'il ordonne qu'il soit fait une chose "à laquelle il ne peut être remédié par le jugement final." Or le jugement final ne pourra remédier à la position qui est faite au défendeur d'être obligé de se défendre à une action qui ne contient pas un libellé suffisant des causes de la demande. Le défendeur, si le jugement renvoyant l'exception à la forme n'était pas renversé, se verrait condamné au mérite de l'action, sans avoir pu y défendre en connaissance de cause.

Nous n'hésitons donc pas à maintenir l'appel pris par McGreevy, et nous le maintenons avec dépens.

The judgment of the Court is as follows :—

"Considérant que la déclaration en cette cause ne contient pas un exposé de ce en quoi ont consisté les fausses représentations et les manœuvres frauduleuses, les prétextes d'erreurs dans la soumission du demandeur (intimé) ni les prétextes de changements dans les plan et devis, ni les influences indues, au moyen de tous lesquels le demandeur aurait été par le défendeur (appelant) induit à changer les termes de sa soumission, et qu'ainsi le défen-

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deur ne peut défendre à cette action en connaissance certaine de ce dont on l'accuse ;

"Considérant que cette insuffisance de l'exposé des causes de la demande est matière d'exception à la forme, et que ce n'est pas le cas de procéder par demande de particularités ;

"Et considérant qu'il y a lieu à l'appel du jugement qui a débouté l'exception à la forme du défendeur, qui invoquait cette insuffisance de l'exposé des causes de la demande, et que ce jugement est erroné, maintient l'appel en cette cause, renverse le dit jugement prononcé par la Cour Supérieure siégeant à Montréal le 13e jour de mars 1891, et procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, maintient la dite exception à la forme, et renvoie l'action sauf au demandeur à se pourvoir, et condamne l'intimé à payer à l'appelant les dépens tant en Cour Supérieure que devant la présente Cour, les dits dépens à être taxés comme dans une cause de deuxième classe en appel."

Judgment reversed.

E. Lafleur for appellant.

J. L. Archambault, Q. C., for respondent.

(J. K.)

23 mars 1891.

Coram DORION, J.C., BOSSÉ, J., BABY, J., DOHERTY, J.A., ET CIMON, J.A.

ANDREW McCONNELL ET AL.,

(*Demandeurs en Cour Supérieure*),

APPELANTS ;

ET

LA CORPORATION DE LA VILLE DE LACHUTE,

(*Défenderesse en Cour Supérieure*),

ET

LA CORPORATION DU COMTÉ D'ARGENTEUIL,

(*Mise en cause*),

INTIMÉES.

*Conseil de Ville—Mode d'ordonner le prélèvement des deniers requis pour payer dettes de la ville—Villes incorporées par acte spécial contribuent à la construction de la bâtisse servant à la Cour Circuit du comté—Appel—*40 *Vict.* (*Q*), *ch.* 29—*C. M. arts.* 513, 514 *et* 515.

Jugé:—1o. Qu'un conseil de ville, en vertu de l'acte des clauses générales des villes, peut, par une résolution, ordonner au secrétaire-trésorier de prélever une somme déterminée pour acquitter une dette de la corporation, ce que le secrétaire-trésorier fera par un rôle spécial de perception ;

2o. Que les villes constituées en corporation par acte spécial sont tenues de contribuer au coût de l'achat d'un terrain et de la construction sur icelui d'une bâtisse pour servir à la Cour de Circuit et au bureau d'enregistrement du comté dans lequel elles sont situées ;

3o. Que la part à contribuer par chacune de ces villes sera établie par le conseil de comté d'après toutefois le montant total de l'évaluation des biens imposables de cette ville, ce montant total étant fourni au conseil de comté par un certificat du secrétaire-trésorier de la ville;

4o. Qu'il y a lieu à appel du jugement rendu en cette cause par la Cour Supérieure, étant une action en la forme ordinaire pour faire annuler des procédés du conseil de la ville de Lachute.

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APPEL d'un jugement de la Cour Supérieure, à Terrebonne (TASCHEREAU, J.), prononcé le 12 février 1889 dans les termes qui suivent :

"La Cour, ayant entendu les parties, savoir, les requérants, l'intimée et la mise en cause, par leurs procureurs respectifs, sur le mérite de la présente cause et de la requête libellée des requérants demandant l'annulation et la cancellation d'une certaine résolution passée par le conseil de l'intimée le sept décembre 1887, et de procédés subséquents relatif à un rôle de perception préparé en conformité de la dite résolution, ayant de plus examiné la procédure, la preuve, les admissions et généralement toutes les pièces du dossier, et sur le tout délibéré :

"Considérant que la dite résolution de l'intimée a été passée pour mettre à effet certains règlements du conseil du Comté d'Argenteuil au sujet de l'érection d'un palais de justice et d'un bureau d'enregistrement pour le Comté d'Argenteuil ;

"Considérant que toutes les municipalités situées dans le dit comté y compris celle de l'intimée, doivent par la loi, contribuer aux frais de telle érection, dans la proportion de leurs évaluations respectives ;

"Considérant que la dite résolution de l'intimée et les procédés subséquents y compris le rôle de perception attaqué en cette cause, étaient devenus nécessaires en conséquence des dits règlements du conseil de comté, et vu les obligations de l'intimée imposées par la loi, et considérant qu'ils sont inattaquables en loi et que les requérants n'en ont pas établi l'illégalité ;

"Considérant que la mise en cause a établi la légalité de ses propres règlements et procédés mises en question par les requérants ;

"Maintient les défenses de la corporation intimée, et celle de la corporation mise en cause, et renvoie la dite requête libellée des requérants avec dépens, contre eux respectivement, distraits, etc."

Ce jugement ayant été inscrit en Cour de Révision, celle-ci (Johnson, Davidson et deLorimier, JJ.), sur motions de la corporation de la ville de Lachute et de la

corporation du comté d'Argenteuil, a, le 22 juin 1889, rayé l'inscription en révision par le jugement suivant: (Voir M. L. R., 5 S.C. 275):

"The Court having heard the parties by their respective counsel, as well upon the defendants' motion as on the motion of the *mise en cause*, both said motions made and filed on the 21st of March last past, to reject the inscription in review by petitioners in present cause, on the ground that no review or appeal exists from the judgment complained of, to wit, the judgment rendered by the Superior Court sitting in the district of Terrebonne on the 12th day of February last (1889);

"Having examined the proceedings, and deliberated, doth grant said two motions, and doth reject the said inscription in review, with costs against said petitioners *distraits* to Maître de la Ronde, attorney for defendants, and to Maître J. A. N. MacKay, attorney for *mise en cause*."

[En Appel]

CIMON, A. J., pour la cour:—

La ville de Lachute a été incorporée par acte spécial, 48 Vict., ch. 72, mais elle est soumise à l'acte des clauses générales des villes. C'est le chef lieu du comté d'Argenteuil, dans les limites duquel elle est située.

Il y avait dans ce comté un vieux palais de justice qui n'était plus convenable pour y tenir la Cour de Circuit du comté, ni le bureau d'enregistrement. Le conseil de comté décida d'en construire un neuf; et, à cet effet, le 8 juin 1887, il adopta un règlement pour l'achat, dans la ville de Lachute, d'un terrain sur lequel devait être construit le nouvel édifice. Ce même règlement décrétait en même temps la construction de l'édifice sur ce terrain. Puis le 15 août 1887, le conseil de comté adopte un second règlement pour repartir entre les différentes municipalités locales du comté et de la ville de Lachute le coût de ce nouveau palais de justice, déterminant, entre autres, la part de la ville à $2,814.76. Sur demande de paiement de cette somme, la ville de Lachute, qui avait reçu une copie

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de ce dernier règlement, adopta, le 7 décembre 1887, la résolution suivante :

"That the secretary-treasurer is hereby authorized to "proceed at once to levy the assessment for our share of "the tax for the building of the Court House and Registry "office now being built by the municipal council of the "county of Argenteuil, and also levy the assessment for "the amount required to pay the interest and sinking "fund for the loan of $6,700, and ten per cent. to both "assessments over and above the amounts required for the "payment of the county council tax and the payment of "the interest and sinking fund for the loan; and the "secretary-treasurer is hereby authorized to acquaint the "warden and the secretary-treasurer of the municipal "council of the county of Argenteuil, that this council is "now proceeding to the collection of the tax levied by "the county council for our share in erecting the Court "House and Registry office imposed."

Conformément à cette résolution, le sécrétaire-trésorier fait un rôle de perception, donne les avis requis, et se met en devoir de le collecter.

Alors McConnell et al. (les appelants) instituent contre la corporation de la ville de Lachute une action, suivant la forme ordinaire, par bref de sommation, etc., concluant à la nullité de cette résolution et du rôle de perception et à ce qu'il soit enjoint à la ville de cesser de percevoir ce rôle. Les raisons qu'ils invoquent sont de deux sortes : 1o. s'attaquant directement à la résolution comme n'étant pas le mode légal à adopter en pareil cas ; 2o. s'attaquant aux procédés du conseil de comté.

La corporation du comté a été appelée en cause dans le cours de l'instance.

1o. *La résolution n'est pas le mode légal*, disent les demandeurs. Ils prétendent que le conseil de la ville de Lachute ne pouvait ordonner le prélèvement de cette somme que par un règlement. Mais la loi ne justifie pas cette prétention.

Ainsi cette somme que réclame le comté, est une dette due par la ville au comté ; celui-ci peut en poursuivre de

suite le recouvrement contre la ville. Or, que dit l'acte des clauses générales des villes, 40 Vict. ch. 29 ? La sec. 367 dit que c'est par *résolution* que le conseil ordonne au secrétaire-trésorier d'ajouter dix par cent au montant de la taxe à prélever. Par la sec. 373, c'est le devoir du secrétaire-trésorier de faire un rôle général de perception, chaque année, au temps fixé par le conseil et comprenant toutes les taxes alors imposées. " Il fera aussi un rôle spécial " chaque fois qu'une taxe spéciale aura été imposée après " la confection du rôle général de perception, *ou chaque* " *fois qu'il en recevra l'ordre du conseil.*" Or, dans le cas actuel, cette résolution est un ordre du conseil de faire un rôle spécial de perception : elle est donc légale. Mais il y a plus. La sec. 395 dit que lorsqu'une copie d'un jugement contre la corporation est signifiée au bureau du conseil, le secrétaire-trésorier doit en acquitter le montant à même les fonds à sa disposition, et la sec. 396 ajoute que, s'il n'y a pas de fonds, le conseil devra ordonner *par résolution* au secrétaire-trésorier de prélever sur les biens imposables de la municipalité une somme suffisante. On voit, tout le temps, que la procédure, en pareil cas, est toujours *la résolution.* Il est évident que si la ville néglige de payer, et si la corporation du comté prend un jugement contre elle, le conseil de la ville devra, *par résolution*, ordonner de prélever le montant. Il serait étrange si, avant le jugement, le conseil ne pouvait pas ordonner *par résolution* le prélèvement de la somme suffisante pour acquitter la dette et éviter ainsi promptement les frais d'action — car un règlement est une procédure plus lente. Aussi la sec. 373 décrète sagement que le secrétaire-trésorier doit faire un rôle spéciale de perception *chaque fois qu'il en recevra l'ordre du conseil.*

2o. Les autres raisons qui s'attaquent aux procédés du conseil de comté, consistent en ce qui suit : la corporation de la ville de Lachute ne forme pas partie de la municipalité du conseil de comté, et celui-ci ne pouvait l'appeler à contribuer à l'érection de ce palais de justice ; — le conseil de comté a refusé à la ville voix délibérative au sujet de la construction de cet édifice ; — le site choisi

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par le conseil de comté n'est pas convenable ; — la part réclamée de la ville excède sa juste proportion ; — le conseil du comté refuse d'appliquer le prix du vieux palais de justice qu'il a vendu, au paiement du coût du nouveau.

Bien qu'on ait mis la corporation de comté en cause, on n'a pris aucune conclusion contre elle, et on ne conclut à la nullité d'aucun de ses procédés.

Il est évident que la corporation de la ville est tenue de contribuer, pour sa part, à la construction de cet édifice. Les statuts 41 Vic. ch. 18, sec. 18, 48 Vic. ch. 28, sec. 11, (antérieurs aux deux règlements du conseil de comté) et le statut 50 Vic. ch. 14 (antérieur au règlement du 15 août 1887) le déclarent formellement. Ce sont des amendements aux articles 513 et 515 du code municipal. Ainsi l'art. 514 du code municipal donne droit au conseil de comté de "pourvoir à l'érection et à l'entretien d'un " bureau d'enregistrement séparé ou faisant partie d'une " maison de justice, dans le comté, avec un coffre-fort en " métal, etc." Puis l'art. 515, — tel qu'amendé par les deux statuts 41 Vic. ch. 18 et 48 Vic. ch. 28, — décrète : " Toute corporation de comté doit se procurer et tenir " constamment dans un ordre parfait un coffre-fort en " métal, ou une voute à l'épreuve du feu, convenable et " suffisante, dans le bureau d'enregistrement du comté ou " de la division d'enregistrement, quelque soit l'édifice où " est tenu ou transporté ce bureau d'enregistrement..... " *La corporation de toute municipalité de ville ou de cité qui* " *se trouve comprise dans le même comté pour les fins d'enregis-* " *trement, est tenue de contribuer* aux frais faits par la corporation de ce comté en vertu de cet article, ainsi qu'aux " frais occasionnés *pour la construction* et la réparation *d'un* " *local* strictement requis pour le service du bureau d'enregistrement, dans la même proportion que *les autres corpo-* " *rations locales du comté*, d'après toutefois le montant total " de l'évaluation de ses biens imposables ; et la corporation " du comté peut déterminer sa part et en recouvrer le " montant *comme de toute corporation locale.*

" Si le conseil de cette ville ou cité refuse ou néglige de " produire, en temps opportun, un certificat authentique

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" du montant de l'évaluation de ses biens imposables, le " conseil du comté peut fixer le montant de sa part, selon " qu'il le croit juste."

L'article 513 C. M., tel qu'amendé par 50 Vict. ch. 14, dit que le conseil de comté peut: " Pourvoir à l'érection " et à l'entretien d'un édifice destiné à la Cour de Circuit, " au lieu fixé pour cette fin. — Pourvoir à l'achat ou à " l'acquisition d'un terrain convenable à l'érection de tel " édifice. — La corporation de toute municipalité de ville " ou de cité, qui se trouve comprise dans le même comté " pour les fins judiciaires ou d'enregistrement, *est tenue de* " *contribuer* aux frais faits ou à être faits par la corporation " de ce comté en vertu de cet article, pour le palais de " justice, au chef-lieu du comté, ainsi qu'aux frais de " réparation jugés nécessaires par la suite, dans la même " proportion que *les autres corporations locales de comté*, " d'après toutefois le montant total de l'évaluation de ses " biens imposables; et la corporation du comté peut dé- " terminer sa part et en recouvrer le montant comme de " toute autre corporation municipale. — Si le conseil de " cette ville ou cité refuse ou néglige de produire en " temps opportun un certificat authentique de l'évalu- " ation de ses biens imposables, le conseil du comté peut " fixer le montant de sa part selon qu'il le croit juste."

Les demandeurs disent que ces villes, dont parlent ces articles du code municipal, sont celles incorporées en vertu des dispositions de ce code et régies par ce même code. Mais une telle interprétation est impossible, car il est clair que ces arts. 513 et 515, tels qu'amendés, n'ont en vue que les villes et cités incorporées par acte spécial. Avant les amendements, bien que ces articles n'eussent pas ces dispositions quant aux villes et cités, il était certain que le conseil de comté pouvait faire contribuer à la construction de cette bâtisse les villes incorporées sous les dispositions du code municipal, comme toutes les autres municipalités locales, puisque ces villes forment partie de la municipalité du comté (C. M. art. 246). Et c'est précisément pour faire contribuer les villes et cités incorporées par acte spécial, qui ne forment pas partie de la municipalité du

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comté (C. M. arts. 1, 2, et 246), que les trois statuts que je viens de citer ont été passés. Inutile d'insister d'avantage sur un point qui ne peut être l'objet d'un doute.

Naturellement, la ville de Lachute n'avait pas de représentant siégeant comme membre du conseil de comté. Mais elle pouvait, comme tout intéressé, faire des représentations à ce conseil de comté. Or, il n'y a pas de preuve que ce conseil ait refusé d'entendre les représentations de la ville ou de ses contribuables. On voit, au contraire, que la question a été discutée par des délégués nommés à cet effet par les deux conseils. On ne se plaint pas que les avis requis n'ont pas été donnés.

Quant à la question du site, ce n'est plus le moment de le discuter. Il peut se faire qu'on aurait pu choisir un site plus convenable, mais ce n'était là qu'une question à débattre devant le conseil de comté, qui a usé de sa discrétion. Cette cour n'a pas de raison pour s'immiscer dans cette discrétion.

Quant au prix de l'ancien terrain, il n'appert pas qu'il ait été payé à la corporation du comté. Il n'y a aucune preuve que la corporation du comté soit actuellement redevable de quelque chose à ce sujet à la ville de Lachute. D'ailleurs, ça ne pourra être qu'un débat de compte entre les deux municipalités, et nullement une raison pour attaquer les procédés du conseil de comté au sujet de la construction de ce nouveau palais de justice.

Vient la dernière objection : la part réclamée de la ville excéderait sa juste proportion. Voici le raisonnement des demandeurs :—par l'art. 740 du C. M., le conseil de comté doit examiner tous les rôles d'évaluation des municipalités locales transmis à son bureau, constater si l'évaluation faite dans chacune de ces municipalités est proportionnée à celle des autres, et augmenter ou diminuer, s'il est besoin, le montant de l'évaluation portée au rôle de chacune de ces municipalités du taux par cent qui lui paraît nécessaire pour établir une juste proportion entre tous les rôles faits dans la municipalité du comté, et cela en vue de répartir justement entres les différentes municipalités locales les dettes ou taxes du comté ; et les demandeurs

disent que la ville de Lachute a estimé ses biens à sa pleine valeur, tandis que les autres municipalités n'ont fait qu'une évaluation d'une moitié ou des deux-tiers de la valeur, et que le conseil de comté a établi la part de la ville de Lachute sans égaliser son rôle à celui des autres municipalités. Mais il est facile de répondre à cette objection. Comme la ville de Lachute n'est pas une municipalité locale sous le contrôle du conseil de comté, elle n'a pas à lui envoyer son rôle d'évaluation. Et les articles 513 et 515 du C. M. disent que le conseil du comté établira la part de la ville de Lachute " dans la même " proportion que les autres corporations locales du comté, " d'après toutefois *le montant total* de l'évaluation " des biens imposables de la ville ; et ce *montant total* est fourni par un certificat du secrétaire-trésorier de la ville. Le conseil de comté ne voit donc pas le rôle d'évaluation de la ville. Il ne parait pas y avoir eu de fraude. De plus, l'art. 742 du C. M. dit que le défaut du conseil de comté d'égaliser les rôles, " n'empêche pas néanmoins l'entrée en " vigueur des rôles d'évaluation *pour les fins de comté.*" En sorte que si les demandeurs invoquent l'article 740, ils ne peuvent le faire sans invoquer l'art. 742, et alors, leur objection tombe. D'ailleurs, on aurait pu faire des représentations au conseil du comté à ce sujet. Puis c'était en s'attaquant directement au règlement du conseil de comté répartissant le coût de cette construction, qu'on pouvait se plaindre à ce sujet. Ce n'est plus le temps maintenant que le règlement est en force, puisque la ville de Lachute s'y est soumise, et procède à prélever ce qui est nécessaire pour y obéir.

Nous croyons donc que le jugement de la Cour Supérieure déboutant l'action des demandeurs est bien fondé.

Reste encore une question. Il y a eu inscription en révision, et sur motions faites respectivement par la défenderesse, la corporation du comté, la Cour de Révision a renvoyé l'inscription en révision, disant qu'il n'y avait pas lieu à appel de ce jugement. Nous croyons qu'il y a erreur sur ce point, car nous sommes d'avis qu'il y a appel.

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Cimon, J.

Pour dire qu'il n'y a pas d'appel, on cite les articles 1033 et 1115 du code de proc. L'art. 1033 ne refuse un appel que des jugements rendus en vertu des dispositions du chap. X, du tit. II, du liv. II du c. de proc. dans les matières concernant les corporations municipales et les offices municipaux. Or le jugement en cette cause n'en est pas un rendu en vertu des dispositions de cette partie du c. de proc. L'art. 1115 refuse l'appel "dans matières "concernant les corporations municipales ou offices muni- "cipaux, tel que prévu en l'art. 1033." Il n'a pas plus d'étendue que cet art. 1033.

On cite de plus la sec. 439 de l'acte des clauses générales des villes : "No appeal shall lie *under the provisions* "*of this Act* from any judgment rendered by any judge of "the Superior Court respecting municipal matters." Mais cette section ne s'applique pas au présent cas. L'action en cette cause en est une prise suivant le droit commun, et nullement sous les dispositions de l'acte des clauses générales des villes. Il est vrai que les demandeurs s'intitulent *requérants*, et ils ont l'air de croire que leur procédure est tout simplement la requête que les sects. 200 et 214 de l'acte des clauses générales des villes donne à *tout électeur municipal* pour faire casser, pour cause d'illégalité, toute résolution, règlement, etc. Mais c'est par bref de sommation qu'ils ont assigné l'intimée, la ville de Lachute, pour répondre à la demande contenue en la déclaration y annexée. Cette déclaration est sous forme de requête, mais elle a toutes les qualités requises d'une déclaration en pareil cas. C'est donc une véritable action, qui a été traitée comme telle tout le temps en Cour Supérieure ; et le jugement prononcé par la Cour Supérieure est un jugement final ordinaire de cette Cour qui est sujet à appel, et auquel ne s'applique pas cette sect. 439 de l'acte des clauses générales des villes.

Nous déboutons donc l'appel avec dépens ; mais nous déboutons aussi les deux motions que la Cour de Révision avait maintenues, et nous confirmons le jugement rendu par la Cour Supérieure en première instance. Les dépens

sont contre les appelants, excepté ceux des deux motions.

Le jugement de la Cour d'Appel est comme suit :

" Considérant qu'il y a lieu à appel du jugement prononcé en cette cause par la Cour Supérieure siégeant en le District de Terrebonne, le 12 février 1889, et qu'il y a eu erreur dans le jugement prononcé, en cette cause, par la Cour Supérieure siégeant en révision, en le District de Montréal, le 22 juin 1889, accordant les motions de la Corporation de la ville de Lachute et de la Corporation du Comté d'Argenteuil qui demandaient le rejet de l'inscription en révision pour la raison qu'il n'y avait pas lieu à révision ou appel du dit jugement de la Cour Supérieure siégeant en le District de Terrebonne ;

" Considérant qu'il n'y a pas d'erreur dans le dit jugement de la Cour Supérieure siégeant en le District de Terrebonne,

" Renvoie les dites deux motions avec dépens contre les dites deux corporations respectivement devant la dite Cour Supérieure siégeant en Révision ; — confirme le dit jugement rendu par la dite Cour Supérieure siégeant en le District de Terrebonne le 12 février 1889 ; et condamne les appelants à payer aux deux corporations intimées les dépens qu'elles ont encourus, tant devant cette Cour que devant la dite Cour Supérieure siégeant tant en première instance qu'en Révision, les dits frais à être taxés devant cette Cour comme dans une cause de deuxième classe."

J. Pulliser, avocat des appelants.

J. A. N. MacKay, avocat de la Corporation du comté d'Argenteuil.

R. P. de Laronde, avocat de la Corporation de la ville de Lachute.

(J. K.)

June 25, 1891.

Coram CROSS, BABY, BOSSÉ, DOHERTY and CIMON, JJ.

ONTARIO & QUEBEC RAILWAY CO.,
(*Plaintiffs in Court below*),
APPELLANTS;

AND

LES CURÉ ET MARGUILLIERS DE L'ŒUVRE ET FABRIQUE DE STE-ANNE DU BOUT DE L'ISLE,
(*Defendants in Court below*),
RESPONDENTS.

Railway Act of Canada, 42 *Vict.*, *ch.* 9—*Award of arbitrators —Prolongation of delay for making award.*

HELD:—1. Under the Railway Act of 1879, 42 Vict., ch. 9, that where the arbitrators appointed to fix the compensation for a property, adjourned to a day subsequent to that originally fixed for making the award, without stating in their minutes that such adjournment was for the purpose of making an award, and at their subsequent meeting the three arbitrators and counsel for the parties were present, and no objection was made to the regularity of the meeting, such absence of objection constituted a tacit ratification of the proceedings up to that time.

2. That an adjournment to enable one of the arbitrators to visit the property, without any date being fixed for the next meeting, did not terminate the arbitration; and that an award made on a subsequent day, the three arbitrators being present, was a valid award.

3. That a notarial award is not necessary in the case of an arbitration under the Railway Act of 1879; that the entering of the amount awarded in the minutes constituted the actual award; and the fact that on a subsequent day the award was made out in notarial form and signed by two of the arbitrators, the other arbitrator not being present, did not invalidate the award as previously made and entered in the minutes.

APPEAL from a judgment of the Superior Court, Montreal (TASCHEREAU, J.), May 18, 1889, in the following terms:—

"Attendu que la compagnie demanderesse a institué la présente action pour faire annuler la sentence arbitrale exécutée devant Marler, notaire, le sept de mars 1887, et

signée par L. J. Forget, arbitre des défendeurs, et par E. H. Bisson, tiers-arbitre, accordant la somme de $12,066.80, pour la valeur de certains terrains appartenant aux défendeurs et expropriés par la demanderesse, ainsi que des constructions situées sur les dits terrains, et pour les dommages causés aux défendeurs par la dite expropriation, le dit immeuble exproprié étant une lisière de terre formant partie du lot connu sous le No. 107 du cadastre de la paroisse de Ste-Anne du Bout de l'Isle, et plus amplement décrite dans la déclaration ;

" Attendu que la demanderesse par sa déclaration telle qu'amendée en vertu du jugement interlocutoire du 9 mai 1887, déclare comme raisons pour faire annuler la dite sentence arbitrale, qu'elle n'a pas été rendue dans le délai fixé, savoir, le ou avant le 23 décembre 1886, mais seulement le 17 de mars 1887, et ce sans que le délai ait été régulièrement prolongé, qu'elle n'a pas été signée par l'arbitre de la demanderesse, George Bury, qui ne parait pas avoir été mis en demeure de la signer, qu'il ne parait pas non plus que des témoins aient été examinés par la dite compagnie, ni que ceux qui ont été examinés eussent été assermentés ; que la compensation accordée par la dite sentence est excessive ; que les arbitres ne pouvaient pas accorder autre chose que la différence entre la valeur de la propriété entière avant l'expropriation, et sa valeur après l'expropriation, qu'ils ne pouvaient pas, ainsi qu'ils l'ont fait, accorder $4,396 comme dommages causés à la partie non-expropriée de la propriété, ni celle de $3,000 comme dommages causés au presbytère, non plus que celle de $100 pour dommages résultant du déménagement des bestiaux, grains, voitures, etc. ; que de fait aucun dommage n'a été causé à la partie non expropriée non plus qu'au dit presbytère ; de plus, durant les procédés de l'arbitrage et antérieurement au prononcé de la dite sentence, l'arbitre des propriétaires, et le tiers-arbitre ont eu fréquemment et à l'insu de la dite compagnie, des communications, des entrevues et des consultations avec les officiers représentant les défendeurs, et notamment avec le curé de la dite paroisse, et que la deman-

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deresse, voyant que la sentence n'avait pas été rendu le jour fixé par les arbitres lors de leur première réunion et que le délai n'avait pas été prolongé au 31 mars 1887, a fait offrir légalement aux défendeurs l'indemnité qu'elle leur avait déjà offerte, et qu'elle leur offre encore, savoir, la somme de $1,270, avec intérêt;

"Attendu que par leurs défenses les défendeurs plaident:

1o. Que dans la cause en expropriation, No. 594, dans laquelle la dite sentence arbitrale a été rendue, la compagnie demanderesse a obtenu possession provisoire du terrain en question, en déposant à la Banque de Montréal, une somme de $15,000 pour garantir le paiement de l'indemnité; que le 30 mars 1887 les dits défendeurs firent signifier à la dite compagnie une requête demandant à la Cour que le montant accordé par la sentence arbitrale leur fût payée sur le montant ainsi déposé; que cette requête, présentée le 1er avril 1887, a été contestée par la dite compagnie, pour les mêmes motifs que ceux allégués dans la dite déclaration; que cette contestation étant encore pendante, la présente action est sans objet;

2o. Que les défendeurs ont refusé d'accepter l'offre de $1,270 faite par la dite demanderesse; que les arbitres nommés pour établir et fixer l'indemnité ont procédé régulièrement et ont entendu les témoins des parties devant les dites parties représentées par leurs procureurs à chaque séance des dits arbitres; que le 12 janvier les dits arbitres, tous trois présents, ont rendu leur sentence sur une partie de la réclamation des défendeurs, et que le 14 février 1887 ils ont rendu leur sentence sur l'autre partie de la réclamation, ainsi qu'entré au bas des minutes des opérations des dits arbitres; que les dits arbitres ont régulièrement et du consentement des parties prolongé le délai d'abord fixé pour rendre la dite sentence, et que l'arbitre de la compagnie a été dûment requis de signer la sentence rédigée par le notaire;

"Considérant que le premier chef de la défense est mal fondé, qu'il n'y avait pas lieu dans l'espèce au plaidoyer de litispendance, que le fait que la compagnie demande-

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resse avait contesté la requête des défendeurs demandant le paiement de l'indemnité constatée par les arbitres ne pouvait empêcher la dite compagnie de porter la présente action dont l'objet est de faire annuler la sentence arbitrale même ;

"Considérant que le deuxième chef de la défense est aussi mal fondé, et que la dite sentence arbitrale parait revêtue de toutes les formalités requises, et parait avoir été régulièrement prononcée par les dits arbitres ;

" Considérant que par les dispositions de l'Acte Refondu des chemins de fer (42 Victoria, chap. 9), il est donné pouvoir aux arbitres de prolonger le délai par eux originairement fixé pour la prononciation de leur sentence arbitrale ; que dans l'espèce les arbitres paraissent avoir régulièrement et du consentement des parties prolongé tel délai, et qu'en conséquence l'objection principale soulevée par la dite compagnie demanderesse à l'encontre de la sentence arbitrale, à savoir, qu'elle avait été rendue après le délai originaire, ne peut être maintenue ;

" Considérant que les autres objections de la compagnie demanderesse ne sont fondées ni en fait ni en loi ;

" Considérant que les défendeurs ont substantiellement établi en preuve les allégués du dit deuxième chef de défense ;

" Considérant que le montant accordé aux défendeurs par la dite sentence arbitrale ne peut être mis en question avec la présente action, et que le montant, fût-il excessif, résultant d'une appréciation erronée ou reposant sur une fausse base, ce ne serait pas une raison en loi pour demander la nullité de la sentence ;

" Maintient le dit deuxième chef de la défense, et déboute la compagnie demanderesse de son action avec dépens, distraits, etc."

The action was instituted by the railway company to set aside an award of arbitrators rendered under the Railway Act of 1879.

The declaration alleged as follows :—

On the 12th August, 1886, the appellants gave notice

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of expropriation for a strip of land at St. Anne's, lying alongside of the Grand Trunk Railway and to the north of it, behind the Presbytery, and they offered for compensation and damages the sum of $1,270. The defendants refused to accept, and appointed Mr. Forget as their arbitrator. Mr. Bury was appointed and acted ultimately as the company's arbitrator, and they appointed Mr. E. H. Bisson as third arbitrator. At the meeting of the 23rd November, 1886, the arbitrators fixed by resolution the 23rd of December then next as the day for making the award, but they did not render the award on or before that date, or in fact before the 17th March, 1887, the time for making the award not having been prolonged either by a consent of parties or resolution of the arbitrators, and in consequence, the offer of the appellant became the amount payable by law and the provisions of the Act.

That the pretended award made before Marler, N.P., on the 17th March, 1887, and signed by Messrs. Forget and Bisson, was not signed by Mr. Bury, or anybody on the appellant's behalf, nor does it appear that he was present or notified to be present, or refused to sign, or that it was ever submitted to him for signature.

That it does not appear by the award whether the witnesses were examined or sworn, and the award is irregular upon its face.

That by the pretended award, the respondent's arbitrator and the third arbitrator purported to award to the respondents, as compensation and damages, $12,066.80, and the amount was made up by the said arbitrators as follows:—

Amount of award		$12,066 80
Made up as follows:		
For land taken at 35 cents per foot	$2,530 50	
And at 10 cents per foot	940 30	
Value of barn	1,100 00	
Removal of cattle	100 00	
Damage to property not taken	4,396 00	
Damages to the house	3,000 00	
		$12,066 80

That the damage was excessive and illegal, and improperly estimated.

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That the arbitrators have no power to award anything except the difference between the value of the whole property before the taking of the said part, and the value of the same afterwards, and the sums of $4,396 and of $3,000 should not have been awarded, no actual or material damage having been suffered, and the sum of $100 for damages for removal was not within the powers of the arbitrators to award.

That the railway in question runs on a strip situated along the line of the Grand Trunk Railway, and long previous the Grand Trunk Railway Company had operated a line of railway within forty feet of the boundary of the property, and that the presbytery was built by the respondents within a year previous to the taking of the property, at a distance of not more than sixty feet from the railway track of the Grand Trunk Railway Company, and appellants, in taking the strip of railway, have not encroached in any way upon the presbytery.

That the appellants were unaware of the day fixed by the arbitrators for the rendering of their award until after the 17th March, and that after discovering that it had not been properly rendered, they did, on the 31st March, tender the compensation due by them under the Railway Act, which they deposited in Court. The declaration prays that the award be set aside, and that the compensation be declared to be the sum of $1,270, and the tender be declared to be good.

The respondents raised in answer the following grounds. By a first plea :—

That in an expropriation matter, number 594, in which the present award was rendered, Mr. Justice Jetté, upon the petition of the company, had accorded provisional possession of the land on the Company depositing in the Bank of Montreal a guarantee of the payment of the indemnity.

That on the 30th March, 1887, the respondents made a petition for an order to pay out to them the amount of the award, and that the petition was contested for the same reasons as those now raised by the declaration.

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That the present action was taken whilst the said contestation on the said petition was pending, and the object of the present action and the moyens are alleged to be the same, and that there is consequently litispendence.

By another plea, the respondents, admitting the notice and nomination of the arbitrators, say that it is true that on the 23rd November, 1886, the arbitrators fixed the 23rd December then next for the rendering of their award, and further allege that they proceeded to hear evidence, and to sit during the months of November, December and January. That at each of these the parties were represented by counsel. That when they fixed the delay for rendering their award, it was agreed between them and the parties represented, that in case the delay should be insufficient it would be prolonged for the time necessary to hear the witnesses and deliberate and render the award.

That all these sittings were adjourned from one to the other, in the presence of and by consent of the parties.

That particularly on the 4th and 5th of January last, the parties examined witnesses, and on the 7th January they pleaded their case before the arbitrators. That on the 12th January, according to the minutes, three arbitrators being present, rendered an award upon part of the claim, awarding a sum of $2,530.50 for the part of the land known as Section A, at 35 cents a foot, and $940.30 for Section B, at 10 cents a foot, and that this was unanimous.

That on the 25th January they met again, and adjourned to examine the property, and that at a sitting on the 24th February they proceeded to render their award upon the balance of the claim.

That the delays were prolonged by the hearing of witnesses.

That the true award of the arbitrators was that entered in the minutes, but that the majority of the arbitrators had signed before a notary, in order that the parties might have true copies.

That Bury, the company's arbitrator, in the absence of the others, made an entry in the minute book of the 25th

February, that he refused to agree to the sentence of the 24th February, and that it was useless to require his signature before the notary, but, nevertheless, he was required, and refused to be a party.

That the alleged excessive award is not a ground of action.

That it is final and without appeal as to the amount.

That even if there are any irregularities in the proceedings of the arbitrators, they are not essential, nor do they cause the company damage.

That the parties heard witnesses, and consented that the arbitrators should determine the amount of the indemnity to be awarded, without regard to the delay which might have been fixed for the rendering of the award.

That the company is not receivable to allege the irregularities of form in matters of form to which it was a party.

The case was twice heard: first, before four judges on Nov. 19, 1890. The *délibéré* being discharged, the case was re-heard, March 18, 1891, before five judges.

Geoffrion, Q. C. and *Campbell* for the appellants:—

The first thing to be referred to is the plea by which the respondents allege that this issue was pending before the courts upon other proceedings. By the Railway Act, the company was obliged to deposit a sum of money in the bank to comply with the terms of the award. This money is payable under the order of the Judge, and the question as to whether or not an application to get such money was a legal proceeding before a Judge has been discussed by the Supreme Court in the case of the Little Seminary of St. Therese, and it was decided that a Judge, in giving such an order, does not act in his official capacity, but merely as a *persona designata*, in whom the Act vests the discretion of paying out money. It would therefore seem that no application made to him would constitute *litispendence*.

The judgment or order in those proceedings was rendered by Mr. Justice Taschereau, who afterwards heard this cause, and by its terms he expressly reserved to the

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company all the recourse which they might have against the arbitrators' award, and more particularly their rights in the action then pending. In the judgment appealed from in this cause, he expressly decides that the contest by the company of the payment of the money out of the bank could not affect the rights in the present action, the object of which was to annul the award itself. The appellants therefore submit that this plea is unfounded.

It remains to discuss the questions raised on the merits. Under the law in force prior to the Railway Act, there was no provision for the keeping of minutes by the arbitrators, nor was there any provision for the writing down of evidence or the taking of appeal, consequently it was not necessary nor was it an absolute custom that any minutes should be kept. Some arbitrators did, and some did not, and such minutes as were kept were not the property of all parties, or accessible to anybody but the arbitrators themselves; consequently the parties had no means of knowing whether the formalities had been observed. The law required the arbitrators at their first meeting to fix a day on or before which the award should be made, and if the same was not made on or before that day, or some other day to which the time had been prolonged, either by consent of the parties or by resolution of the arbitrators, the sum offered by the company should be the compensation payable. A reference to the minutes will show that the arbitrators met for the first time on the 11th November, when the curé and his counsel were present, but no day was fixed for the rendering of the award. This of itself would render the proceedings null. On the 23rd November, at a meeting at which counsel for the respondents was present, but as is expressly stated in the minutes, no counsel was present to represent the railway company, it was resolved that the arbitrators make their award on or before the 23d of December. As appears by the minutes, many meetings were held, but in none of them does it ever appear that the parties ever gave a consent to prolong the delay, or that any resolution was made by the arbitrators for that purpose, so that

there are apparent on the face of the proceedings two irregularities such as were characterized by this Court in the case of the *North Shore Railway Company & Beaudet*, 11 Q. L. R. 241, as being radical and substantial nullities, namely, (1) the arbitrators did not at their first meeting, fix any day for the rendering of their award; (2) the day that they fixed at their other meeting was not observed, nor was delay ever legally prolonged.

It is pretended by the respondents that there was either a tacit consent or acquiescence, but this has not been shown in any way. No one was present as representing the company at the time when the delay was originally fixed, nor is it shown that any one acting on behalf of the company, had knowledge of the time which had been fixed, or was in a position to know, at the meeting of the 22nd December, 1886, that the delay for rendering the award would expire before the next meeting. It has been pretended in evidence that this was known to the company's counsel, but the evidence of Mr. Forget and the minutes completely dispose of the pretension that any one on behalf of the company was present and acquiescing in the manner in which the delay was fixed, or had any knowledge of the fact that it had been fixed.

The proceedings under the Act cannot be considered in any way resembling proceedings before *amiables compositeurs*. Both the company and the proprietors are forced into these proceedings by the effect of law, and they very often result in very excessive amounts being awarded as compensation. In the immediate instance, a sum of no less than $12,000 had been awarded for a strip of land lying next to the Grand Trunk Railway Company, the loss of which did not affect the value of the property, nor cause any greater inconvenience than would have been done had the Grand Trunk Railway Company built a double track upon their own property, as they have since done. They could in fact have built on their own property a line which would have been almost as near to the curé's house as the present line of the appellant's is, and the respondents would have been entitled to no damage whatever.

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Under these circumstances, the appellants submit that they are entitled to take advantage of such nullities as these, which have been characterized as radical and substantial by this Court in the case above referred to.

It has been also argued that the presence of counsel at the meetings held after the 23rd of December, constituted an acquiescence. This of course is made purely as an argument. It is not pretended that the matter was ever referred to or that counsel ever knew that a delay had been fixed or what delay, or that any time whilst they were proceeding, they were proceeding with the knowledge that such an irregularity existed, and were willing to waive it. Some such proof, it is submitted, ought to have been made before the Court should be asked to decide that there was a tacit waiver. Moreover, the law required the consent of parties.

There being no provision for the employment of counsel, or representation before the arbitrators, there is no presumption that the attorney sent there for the purpose of watching the evidence, had any authority to acquiesce in prolonging the delay, or in doing any act which would have the effect as in this case, of forcing his clients to pay ten times the amount that was legally due by them. It would, it is submitted, be carrying the doctrine of implied authority and of tacit acquiescence to an unjustifiable extent.

The appellants also complain that no notice was given of some of the meetings, nor of the ultimate signing of the award.

By the Code of Civil Procedure, Art. 1352, it is provided that the awards of arbitrators must be in authentic form, or deposited in the hands of a notary, and they must be rendered, pronounced or signified to the parties within the delay fixed by the submission. The form of these proceedings, it is submitted, must be governed, when not provided for, by the law of the province in which they take place, and consequently that an award of arbitrators must be in notarial form, in this province, and must also be signified to the parties, within the delay

fixed, by submission or as provided by law in reference to forced arbitrations. In this case it is pretended by the respondents, that because Mr. Bury did not agree with the minute which was drawn up by the arbitrators, his presence was unnecessary at the rendering of the notarial award. This, the appellants submit, is entirely unjustifiable reasoning. The arbitrators are all supposed to be chosen because of their knowledge of the matters in dispute, and both parties are entitled at all times to insist that the three arbitrators should be present. Because Mr. Bury refused to concur in the views of Mr. Forget and Mr. Bisson, it does not follow that he might not have induced them to change theirs. The railway company are entitled to the benefit of the argument that he might have used, or the influence he might have had, with these gentleman to make them change their minds, and this up to the last moment. The mere fact that they had discussed the matter, and had arrived at a conclusion which they had placed upon the minute-book, did not preclude them from changing their intentions at the last moment, and supposing they had been within the delay for rendering the award, they might have legally altered the amounts at the last moment, while before Mr. Marler, but by going as they did without notice to Mr. Bury, they deprived the appellants of the advantages which they might have had from Mr. Bury's presence and arguments.

It is pretended in the plea that the real award is the minutes in the arbitrators' book.

It is to be observed that it is for the first time treated as being the award in the plea. The petition to obtain payment of moneys, expressly set up the deed before Marler, N.P., as being the award, and alleges its signification upon the parties.

This notice has been held by the Supreme Court in the case which will be found reported in Cassel's Digest, on page 15, to be a fatal irregularity. The want of service of the award within the delay is also held to be fatal, both by this Court, in the case of *Blanchette & Charand*, 4

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L. C. J. 8, and by other judges in the case of *Brown & Smith*, 6 L. C. J. 112.

In considering the values, the arbitrators departed from the well-known rule by which damages and compensation are to be estimated, that is, that you are to take the value of the property before the railway passed, then take the value of the property after the railway passed, and deduct the one from the other, and the difference is the amount of compensation and damages. The company, by their franchise, are not bound to pay any damages or compensation to persons whose property is not affected, nor are they to pay the parties whose properties are affected, any damages for reasons of sentiment, or for causes not affecting the value of the land. No doubt the building of a railway does cause considerable expense to the parties who would live on the property, the whole or part of which is taken by the railway; they may have to move their furniture and property, and the premises may be to them much less desirable than they were before, but it is submitted that the only safe rule is that that has been propounded above, and which is well stated in Potter's Dwarris, p. 390, Note 2.

The amount of the award should properly be only for compensation and damages for the value of the land and exercise of the company's franchises upon it. The only danger which is referred to by Mr. Forget would be the danger of trains running off the track and injuring the house. This, he says, he took into consideration, but this danger, it is submitted, could only result from negligence in the operation of the road, or from superior force, and in the first event the company would be liable to an action in damages. In the second, the loss would have to be borne where it fell. In neither is it a part of the value of the property. The general depreciation of the property was fully considered by the arbitrators, and an allowance which the appellants consider was excessive was made for it. The effect of the additional allowance of $3,000 to the presbytery is to pay the respondents twice for the same property. The same may be said of the

barn; the respondents were awarded the whole value for a barn, in addition to the value of the ground, although, as stated by Mr. Bury, it was only requisite to move the barn 30 or 40 feet.

The appellants also submit that the whole of the award is excessive. The property itself consisted, prior to the construction of the appellant's railway, of a long strip of land, north of the Grand Trunk track at St. Annes, lying opposite the church, and more than deep enough, both before and since the building of the appellant's railway, to lay out building lots upon the streets which border it. The Grand Trunk Railway Company had sufficient land upon which to build their double track, and additional sidings, the construction of which would have brought their railway as close to the house as the appellants' railway is now. The property in itself was rocky in character, and fit for nothing but the building of the poorest kind of houses. For this purpose, it was not in any way really affected, and the appellants have not made the position of it any worse or caused any loss except of the land that they actually took for the purpose of the construction of their line.

As to the damage to the house, the house itself was constructed after the Grand Trunk Railway had been built and operated for years, and so close to it that there was no appreciable difference between the noise and smoke from one line and the noise and smoke from the other. The value of the house is but very slightly affected.

The appellants submit that the award is irregular, and should be set aside for the following, among other reasons:

1. Because no delay was properly fixed for the rendering of the said award.

2. Because the delay as afterwards fixed was not observed.

3. Because the delay was never prolonged in the manner required by law.

4. Because the company's arbitrator was not notified to be present at the rendering of the notarial award.

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5. Because the notarial award was not signified upon the parties within the time required by law.

6. Because the arbitrators considered, in making their award, that they were entitled to award damages for noise caused by the running of the trains and smoke, etc.

7. Because they considered and awarded illegal damages for the houses and barn.

8. Because the award is excessive.

Taillon, Q. C., and *Bonin* for the respondents :—

L'appelante invoquait pour faire annuler la sentence arbitrale le fait que cette sentence n'aurait pas été rendue, suivant elle, dans les délais fixés par les arbitres à leur première séance.

Mais la compagnie, elle, a participé aux procédés postérieurs au 23 décembre 1886, jour fixé d'abord par les arbitres pour rendre leur sentence ; elle a fait entendre ses témoins et plaidé sa cause après cette date, sollicitant avec instance un jugement en sa faveur ; ce n'est que lorsqu'elle est condamnée à payer $12,066.80, qu'elle soulève une question de forme ; et offre généreusement $1,200 en paiement de tous dommages estimés par les trois arbitres unanimement à $12,066.80.

Trois jugements ont déjà repoussé les prétentions de l'appelante. Le premier, sur la requête des intimés pour être payés des $12,066.80 et des intérêts, à même le dépôt de $15,000 fait par l'appelante pour prendre possession provisoire du terrain. Cette requête fut accordée par l'hon. Juge Taschereau. Sur motion à la Cour Supérieure pour réviser cette décision du juge en chambre, le premier jugement fut confirmé par l'hon. juge Jetté, après des débats prolongés. Les $12,066.80 ont été payés aux intimés par la Banque de Montréal, et les frais sur l'expertise ont également été payés aux avocats des intimés par la compagnie elle-même. Enfin, un troisième jugement a été rendu contre l'appelante par la Cour Supérieure dans la cause actuelle, et les intimés n'ont aucun doute que la Cour d'Appel confirmera le jugement des premiers juges.

L'appelante avait bien, dans son action, allégué que le

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montant accordé était trop élevé, mais elle n'a pas même tenté de prouver cette allégation, qui, du reste, était inadmissible en droit, les arbitres étant, par la loi des chemins de fer de 1879, Ottawa, maîtres absolus de l'appréciation des dommages causés par l'expropriation forcée. Elle allègue bien aussi que la sentence n'a été rendue que par deux des arbitres, savoir, celui des intimés et le tiers-arbitre, mais cette prétention est démentie par le livre des minutes des procédés des arbitres, signé par les trois arbitres, et tenu sous la direction de M. George Bury, l'arbitre de la compagnie.

Ce livre constate que tous les items ont été accordés par les trois arbitres unanimement, dans les séances du 12 janvier et du 24 février 1887, mais le 25 février, M. Bury, qui avait la garde du livre des minutes, a pris sur lui de rétracter, seul et en l'absence de ses collègues, la sentence qu'il avait rendue avec eux la veille, et d'ajouter à sa signature au bas des minutes du 24 février les mots: "*minutes only.*" Il l'admet lui-même dans sa déposition; la chose était évidente à la simple vue de l'original du livre, ces mots étant de la même encre que l'ajouté du 25 février. Ce livre a disparu depuis que la cause a été plaidée en Cour Supérieure; heureusement que les intimés en avaient fait faire une copie d'avance par le protonotaire, en prévision de cet événement. Cette copie a été plus tard substituée à l'original perdu.

D'ailleurs, que dit M. Bury dans son ajouté du 25 février? Il ne dit pas que $1,200 suffisent; mais que le montant accordé excède la valeur des dommages causés au terrain et aux bâtisses. Le témoignage de M. Forget, tiers-arbitre, est positif, que M. Bury s'est accordé avec les deux autres arbitres sur tous les items; même les autres arbitres ont consenti à diminuer le montant de l'indemnité, pour rendre une sentence unanime.

Quand l'appelante dit que la sentence arbitrale n'a été rendue que par deux arbitres, elle parle de l'acte notarié, fait quelques jours plus tard devant Marler, notaire. M. Bury, l'arbitre de la compagnie, ayant été éclairé de nouvelles lumières, dans la nuit du 24 au 25 février, et étant

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à l'épreuve de toute influence de la part des officiers de la compagnie, avait changé d'avis, et refusa de signer l'acte authentique chez le notaire. Mais ce refus tardif et ce changement d'avis n'empêchent pas que la véritable sentence, celle du 24 février, a été rendue par les trois arbitres unanimement.

Voilà pour le côté équitable de la cause.

Il n'y a donc qu'une seule question à discuter. La sentence rendue après le délai fixé par les arbitres à leur première séance est-elle nulle ?

L'acte des chemins de fer de 1879, Ottawa, sect. 9, § 21, porte que le délai peut être prolongé *du consentement des parties* ou par une résolution des arbitres.

Nous soumettons que le délai fut prolongé du consentement des parties, et même par résolutions répétées des arbitres. Voici les faits, tels que constatés par les témoignages des arbitres et par le livre des minutes.

Quand les arbitres ont, à leur première séance, fixé le 23 décembre pour rendre la sentence, il fut compris que si le délai n'était pas suffisant, il serait prolongé.

Les intimés soumettent que l'ajournement par les arbitres pour entendre la preuve et les parties et pour rendre la sentence après le délai, est une prolongation virtuelle des délais par les arbitres ; de même que la comparution des parties au jour fixé par l'ajournement et après le délai, et leur participation aux procédés des arbitres est une prolongation virtuelle du délai par les parties.

1o. Le consentement des parties peut être exprès ou *tacite*, et résulter des faits et circonstances, tels que la comparution volontaire des parties, la remise de pièces, notes, mémoires, etc.

Ainsi jugé le 1 déc. 1857. Req. (Perrin), D. P. 1858, 1, 29 et 30, et notes.—11 déc. 1848. Rennes (Meslin), D. P. 1851, 5, 31.

La sentence rendue après le délai du compromis ne peut être attaquée par la partie qui n'a point protesté lors de cette sentence, contre la prolongation tacite de ce délai. —11 nov. 1845, Paris (Mathon), D. P. 46, 4, 18 ; ni par la partie qui depuis l'expiration de ce délai, a volontaire-

ment comparu devant les arbitres, 19 janvier 1844, Montpellier (Lanthier) D. P. 1847, 2, 118; 29 janvier 1846, Grenoble (Sestier), D. P. 47, 2, 117 et 118.

La doctrine est conforme à la jurisprudence.—Carré & Chauveau, Question 3282; les parties peuvent prolonger elles-mêmes le délai, ou autoriser les arbitres à le prolonger.—*Id.*, Supplément, vo. Arbitrage, p. 279.

Question 3284, *bis*. La prolongation peut résulter de faits, tels que la présence des parties, la participation à la procédure des arbitres, etc.—*Id.*, Supplément. Vo. Arbitrage, p. 280.—*Rolland & Cassidy*, en appel, M. L. R., 2 Q. B., p. 238.

2o. Le consentement donné par l'avocat ou le procureur lie le client pour la prolongation du délai, 6 août 1856, Civ. (Chauchart), D. P., 56, 1, 331; 4 Can. S. C. R. 640,—*Oakes & City of Halifax*.

3o. Les arbitres ne sont pas tenus de donner avis de leurs séances aux parties, ni de les entendre; il suffit de l'ajournement des arbitres; l'avis à l'arbitre suffit; sect. 9, § 17.—*South Eastern R. Co. & Guévremont*, 15 Rev. Lég., p. 258, en appel, 1887.

4o. La fixation d'un jour pour rendre la sentence n'est pas obligatoire, mais seulement *directory*. Ainsi jugé unanimement par la Cour Suprême du Canada dans *Beaudet & North Shore Ry.*, 11 Leg. News, p. 35.

Quand deux plaideurs consentent volontairement à soumettre leur différend à la décision de deux ou trois arbitres, qui, cependant, doivent rendre leur sentence dans un délai convenu, on conçoit que ce délai soit généralement de rigueur; cependant, même dans ce cas, si les parties procèdent après le délai fixé, elles sont considérées avoir prolongé le délai tacitement et cela suffit; à plus forte raison, quand l'une des parties est expropriée forcément, ne doit-elle point souffrir de la mauvaise volonté ou de la négligence des arbitres, ou de l'omission d'une formalité de leur part; et si les arbitres ont alors le pouvoir de prolonger eux-mêmes le délai, il n'est pas nécessaire d'une résolution formelle; le fait seul d'ajourner les procédés à un jour ultérieur suffit. C'est ce que les ar-

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bitres ont fait, ici, du consentement, avec le concours et la participation des deux parties.

June 25, 1891.]

CIMON, J. :—

Action par la compagnie appelante pour faire annuler une sentence arbitrale accordant aux intimés $12,066.80 pour l'expropriation de leur terrain.

Arbitres: G. Bury, pour la compagnie; L. J. Forget, pour les intimés; E. H. Bisson, tiers-arbitre.

L'arbitrage a eu lieu sous les dispositions de l'*Acte refondu des chemins de fer*, 1879—Canada, 42 Vict., ch. 9. La sec. 9 § 21 dit: "La majorité des arbitres à leur 1re sé- "ance après leur nomination... fixera le jour auquel ou "avant lequel la sentence sera rendue; et si elle n'est pas "rendue le ou avant ce jour, *ou un autre jour auquel du "consentement des parties ou par résolution des arbitres elle a "été ajournée*, alors le montant offert par la compagnie sera "l'indemnité qu'elle aura à payer." Et le § 17 disait que "nulle adjudication ne sera rendue, ou nul acte officiel "ne sera fait par la majorité d'entre eux, excepté à une "assemblée tenue dans un temps et dans un lieu dont "l'autre arbitre aura reçu avis au moins deux jours en- "tiers d'avance ou auquel a été ajournée une assemblée à "laquelle a assisté le tiers-arbitre; et *il ne sera pas néces- "saire de signifier d'avis à aucune des parties, mais elles seront "suffisamment notifiées par l'entremise de l'arbitre qu'elles "auront nommé ou dont elles auront demandé la nomination.*"

La 1re séance des arbitres a eu lieu le 11 nov. 1886. Les arbitres Bisson et Bury seuls étaient présents; celui des intimés n'y était pas; et, comme il ne parait pas en avoir eu avis, on ne pouvait rien faire d'officiel pendant son absence. Aussi, les deux arbitres présents ajournèrent l'assemblée *sine die*.

23 nov. 1886.—*Seconde assemblée.*—Les trois arbitres sont présents, mais l'arbitre de la compagnie "objected to pro- "ceeding on the ground of there being no notification "that this meeting was to be held to-day and counsel not "being present to represent the Railway Co."

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Cependant, à cette assemblée, les trois arbitres fixent le 23 décembre, comme le jour auquel ou avant lequel la sentence sera rendue. Puis les trois arbitres ajournent l'assemblée au 1er décembre. La minute des procédés de cette assemblée du 23 nov. est signée des trois arbitres.

Assemblée du 1*er décembre.*—Les trois arbitres sont présents. Les deux parties y sont représentées par leurs avocats: on entend des témoins. Puis l'assemblée est ajournée au 2 décembre.

Assemblée du 2 *décembre.*—Les trois arbitres présents ainsi que les avocats des parties. On entend des témoins. Ajournement au 9 décembre.

Assemblée du 9 *décembre.*—Comme le tiers-arbitre Bisson n'y est pas, les deux autres arbitres, en présence des avocats des parties et sans objection, ajournèrent au 14 décembre.

Assemblée du 14 *décembre.*—Les trois arbitres et les avocats des parties, présents. On entend des témoins. Ajournement au 22 décembre.

Assemblée du 22 *décembre.*—Les trois arbitres et les avocats des parties, présents. On entend des témoins. Puis, sans objection aucune, on ajourne au 28 décembre.

On met donc de côté le 23 déc., jour fixé à l'assemblée du 23 nov. pour rendre la sentence. Arrêtons-nous un peu ici.

Les appelants ont deux objections: 1o. ils disent qu'à la 1re assemblée, il n'y a pas eu de jour fixé pour prononcer la sentence; et 2o. qu'après avoir à la seconde séance, bien qu'irrégulièrement, fixé le 23 déc. pour cela, on a passé outre sans prononcer la sentence ce jour-là.

Disons que toutes ces assemblées et les procédés qui y ont eu lieu sont constatés par des minutes tenues et signées par les arbitres. Il est évident, s'il y a eu quelques irrégularités à la 1re assemblée du 11 nov. et la 2de du 23 nov., elles se trouvent couvertes par les procédés des trois arbitres et la présence des parties, par leurs avocats, à toutes les assemblées subséquentes, vu que les parties y ont produit des témoins et ont participé à tous les procé-

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dés et à tous les ajournements qui ont eu lieu, chaque fois, à une date fixe, et sans qu'elles aient soulevé aucune objection. Et si, au 23 nov., on a irrégulièrement fixé le 23 déc. pour rendre la sentence, alors chaque ajournement qu'on a fait à un jour fixe était censé être un jour fixé pour rendre cette sentence. Et, d'un autre côté, si la date du 23 déc. a été régulièrement fixée, alors les arbitres pouvaient la proroger, comme ils l'ont fait en ajournant l'assemblée du 22 décembre au 28 décembre, ce qu'ils ont fait sous forme de résolution consignée aux minutes de l'assemblée signées des arbitres. Et on va voir, plus loin, que les parties ont acquiescé à cette prorogation en procédant, devant les arbitres aux assemblées subséquentes, sans soulever aucune objection.

Assemblée du 28 *décembre.*—Les trois arbitres et les avocats des parties sont présents. On entend des témoins. Ajournement au 4 janvier 1887.

Assemblée du 4 *janvier.*—Les trois arbitres et les avocats des parties sont présents. On entend des témoins. Ajournement au 5 janvier.

Assemblée du 5 *janvier.*—Les trois arbitres et les avocats des parties, présents. On entend plusieurs témoins. Ajournement au 7 janvier.

Assemblée du 7 *janvier.*—Les trois arbitres et les avocats des parties, présents. "The argument of counsel on both "sides, was heard at 12.30 p. m., the meeting adjourned "at 1.30 p. m. The arbitrators met at 1.30 p. m. accord-"ing to adjournment, when argument of counsel was "continued and closed." Puis on ajourne au 12 janvier.

Chacun de ces ajournements depuis le 22 déc., étant à un jour fixe, on ne peut nier (et d'ailleurs les appelants semblent avoir admis cela à la plaidoierie orale) que ça été chaque fois une prorogation du délai pour prononcer la sentence. Et la plaidoierie faite le 7 janvier devant les arbitres par les avocats des deux côtés, sans objection aucune aux procédures antérieures, est un consentement tacite des parties ratifiant les procédés jusque-là. Ainsi on lit au *Dict. de Droit com. de Goujet et Merger* (ed. de Ruben de Coude), vo. arbitrage, No. 128.

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"Cette prorogation (de la durée de l'arbitrage) est valablement consentie soit avant l'expiration du délai primitif, *soit depuis*. Dans ce dernier cas, la prolongation "*emporte ratification implicite de tout ce qui a pu être fait par* "*les arbitres après l'époque où leurs pouvoirs avaient cessé.*" Et —*vide* No. 129—on voit que la volonté des parties à cet effet peut être constatée par *procès-verbal des arbitres*. Une telle intention des parties—*vide* No. 130—peut résulter "de ce que, après l'expiration des délais du compromis, "les parties ont remis aux mains des arbitres les pièces, "notes et documents nécessaires à l'accomplissement de "leur mission, ou de ce que, après ces délais, les parties ont "continué de produire des défenses ou mémoires devant "les arbitres."

Jusqu'au 7 janvier, y compris l'assemblée tenue ce jour-là, la compagnie appelante a donc implicitement ratifié tous les procédés antérieurs et les procédés de ce jour-là.

Assemblée du 12 *janvier*.—Il ne peut y avoir de doute que cette assemblée est une prolongation régulière du délai de l'arbitrage. Les trois arbitres sont présents, mais on n'y voit pas les parties ni leurs avocats. Les trois arbitres s'accordent pour certains items de la réclamation des intimés: ils s'accordent à donner $2,530.50 pour la sec. A et $940.30 pour la sec. B. Ils ajournent, ensuite, pour le reste, au 25 janvier. C'était une nouvelle prolongation, régulière aux termes de la loi. L'arbitre Bisson, dans son témoignage, p. 2, dit à ce sujet: "Nous avons "ajourné pour continuer à rendre notre sentence."

Assemblée du 25 *janvier*.—Les trois arbitres seuls y sont présents. Le procès-verbal de cette assemblée, signé des trois arbitres, dit ce qui suit: "After some discus-"sion, the meeting was adjourned in order that the arbi-"trators might again inspect the property at St-Ann's to "be expropriated." L'arbitre Bisson—le tiers-arbitre—dans son témoignage, parlant de ce qui a eu lieu à cette assemblée du 25 janvier, dit: "On a discuté sur certains "items et ensuite on a ajourné pour m'envoyer à Ste-Anne, "pour examiner de nouveau les lieux, parce que je ne "connaissais pas les lieux assez bien.

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"Q. Je vous demande si vous avez ajourné dans ce but-
"là, pour examiner la propriété ?
"R. Pour *continuer* à déterminer la valeur de la pro-
"priété."

C'est à partir de cette assemblée du 25 janvier, que commence la plus grande difficulté. Remarquons que les arbitres ont ajourné sans fixer un jour déterminé ; et la compagnie appelante prétend que cet ajournement n'en est pas un régulier, et que le pouvoir des arbitres a pris fin après cette assemblée du 25 janvier ! Mais il est évident que l'intention des arbitres, en ajournant ainsi,—sans fixer un jour déterminé pour se réunir—n'était pas de mettre fin à l'arbitrage ; ce n'était pas parce qu'ils considéraient que l'indemnité offerte par la compagnie était suffisante. Au contraire, ils avaient déjà exprimé l'opinion que sur deux des items les intimés avaient droit à $3,470.80, ce qui était près de trois fois la somme totale offerte par la compagnie. Et cet ajournement—sans être à un jour fixe, était dans un but spécial,—*pour aller visiter de nouveau les lieux.* Et les arbitres ont subséquemment accordé une somme totale de $12,066.80 au lieu de $1,270 seulement que la compagnie offrait. Ça serait interpréter la loi bien trop rigoureusement que de dire, parce que les arbitres ont omis de faire cet ajournement à un jour fixe, alors l'arbitrage devra tomber et les intimés se contenter de $1,270 au lieu de $12,066.80 qui leur appartiennent, ainsi que le demande la compagnie dans les conclusions de son action !

L'ajournement, bien qu'indéterminé, est cependant fait dans des termes tels et dans un tel but, qu'il est évident qu'il équivaut à une résolution des arbitres prolongeant le délai de l'arbitrage jusqu'après la visite des lieux,—car il implique qu'après cette visite les arbitres se réuniront de nouveau pour terminer la sentence, et c'est ce que les arbitres ont fait. Une surprise, une simple inadvertance en procédure ne peut devenir irréparable, car ça serait contraire à tout principe de justice et de procédure.

Et cet ajournement du 25 janvier, en apparence indéterminé, l'est devenu à un jour certain, le 24 février, puis-

que, ce jour-là, on trouve les trois arbitres réunis qui prononcent la sentence et fixent définitivement l'indemnité totale à $12,066.80, et cela sous leurs signatures constatées au procès-verbal de cette assemblée. Le délai n'a pas été exorbitant. Il est certain que, par le texte de la loi, les arbitres avaient le pouvoir de prolonger le délai pour rendre la sentence du 25 janvier au 24 février, et il me semble que ce qu'ils ont fait est une véritable prolongation, ayant ainsi substantiellement observé la loi.

Donc, le 24 février, les arbitres *prononcent la sentence.* L'arbitre de la compagnie y participe. Il est vrai qu'il dit qu'il n'a pas concouru dans le montant de l'indemnité, qu'il croyait excessif; mais, tout de même, il ne fait aucune objection à la *procédure.* Il signe, même, avec les deux autres, la minute de l'assemblée et de la sentence. L'appelante ne peut se plaindre de n'avoir pas eu avis de cette assemblée, puisqu'elle y était représentée par son arbitre. Remarquons que ce n'est pas le cas des arbitrages volontaires dont traite notre Code de Procédure, où le délai de l'arbitrage ne peut être prolongé que par le consentement des parties. Ici, c'est un arbitrage forcé, dont le statut établit les règles particulières, et, par ces règles, les arbitres peuvent, même malgré les parties, prolonger le délai de l'arbitrage.

La sentence prononcée le 24 février, est la véritable sentence. Il suffit qu'elle ait été sous la signature privée des arbitres ; car les règles de l'arbitrage volontaire fixées au Code de Procédure ne s'appliquent pas ici, et diffèrent même sur des points essentiels, de celles établies par le statut. Il n'est pas nécessaire ici que la sentence soit reçue en forme notariée ou déposée chez un notaire. Le statut ne l'exige pas. Il prescrit seulement (sec. 9 § 26) qu'elle établisse "d'une manière précise le montant ad-"jugé et les terrains ou autres propriétés, droits ou choses "dont ce montant est l'indemnité." Or la sentence en cette cause est précise quant au montant accordé. La compagnie appelante ne se plaint pas du défaut de précision des terrains. D'ailleurs, s'ils n'étaient pas suffisamment décrits, ça ne serait pas une cause de nullité de la

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sentence, car cette Cour, à Québec, dans la cause de *La Compagnie du Chemin de Fer du Nord & L'hôpital du Sacré Cœur* (15 R. L. 599), a jugé ainsi: "Considérant que la "sentence arbitrale sur laquelle cette action est basée, est "obscure et n'indique pas suffisamment si l'immeuble "pour lequel ils ont accordé l'indemnité mentionnée dans "leur sentence est le même que celui désigné sous le No. "8 du plan du dit chemin de fer; et considérant qu'il "était au pouvoir de la Cour de première instance de ren-"voyer aux arbitres leur sentence pour donner l'occasion "de l'interpréter....." Ainsi, dans l'opinion de cette Cour, on aurait pu demander aux arbitres de compléter la description des terrains. Cela est conforme à ce que disent Pigeau, 1 vol., p. 27, et Guyot, vo. arbitrage.

Maintenant, la compagnie était censée présente le 24 février à la reddition de la sentence, puisque son arbitre y était. La sentence est donc comme si elle avait été rendue à la compagnie elle-même, puisque le statut veut que son arbitre la représente et qu'elle soit, par son entremise, suffisamment notifiée. La sentence n'avait donc pas besoin d'être signifiée à la compagnie appelante. Il est vrai qu'un statut récent—51 Vict., ch. 29, sec. 161 § 2 —dit que quand le montant de la sentence excède $400, l'une ou l'autre des parties peut en appeler sous un mois après qu'elle a reçu d'un des arbitres un avis écrit de la sentence. Mais cela n'est que pour déterminer le délai d'appel et n'existait pas sous la loi antérieure qui gouverne la sentence en cette cause. D'ailleurs, ce défaut d'avis ne fait pas annuler la sentence, mais seulement retarderait le délai d'appel.

Plus tard, le 15 mars, les deux arbitres Forget et Bisson ont fait rédiger la sentence par acte notarié devant Mtre. Marler. Cet acte notarié décrit les terrains plus au long que dans la sentence rendue le 24 février, mais c'est la même sentence. L'arbitre de la compagnie—Bury—n'était pas présent à cet acte notarié; il n'a pas eu avis d'y assister et n'y a pas participé. Je suis bien d'avis que cet acte notarié n'était pas nécessaire, comme je l'ai fait remarquer plus haut. Je sais que, dans un grand

nombre de cas, on a eu la pratique de mettre ces sentences sous forme notarié ; mais je sais aussi que, dans un grand nombre d'autres cas, on n'a pas suivi cette pratique. Le statut n'exige pas cette forme notariée. Voici ce qu'on lit à ce sujet au même *Dict. de Droit com.*, que j'ai cité, vo. arbitrage, No. 243 :

"Dès qu'il y a eu décision prise et arrêtée, le jugement "arbitral existe pour les arbitres indépendamment de "toute rédaction nouvelle ; en conséquence, lorsque trois "arbitres s'étant réunis pour délibérer, après avoir en- "tendu la défense des parties, deux ont déclaré leur opi- "nion dans le même sens, cette déclaration constitue un "véritable jugement, alors même qu'elle contient renvoi "à un autre jour pour rédiger et signer la sentence. *Dès* "*lors, il importe peu que le troisième arbitre n'ait pas été pré-* "*sent à la séance où la rédaction définitive a été arrêtée et qu'il* "*n'ait pas signé le procès-verbal.* Cass., 6 juillet 1830 ; Paris, "17 juin 1836 (S. 37.2.417.—D. 36.2.133). V. aussi Cass., "6 juillet 1840 (S. 40.1.882.—P. 40.2.512.—D. 40.1.242) ; "Lyon, 2 mai 1844 (S. 4.5.2.88)." En France, on applique à la sentence arbitrale les formalités des jugements. Le statut n'impose pas d'autres règles.—Dans le cas actuel, la sentence ayant été prononcée le 24 février, et constatée par écrit sous la signature des trois arbitres,—quel mal y avait-il pour cette sentence que Forget et Bisson l'ait ensuite déclarée à un notaire qui l'a mise sous forme notariée ? C'était une mesure de prudence. La majorité des arbitres donnait à la sentence déjà prononcée validement une preuve plus solennelle. Comme l'arbitre de la compagnie prétend n'avoir pas concouru au montant accordé, qu'il trouvait excessif, quel besoin y avait-il de l'appeler à cet acte notarié, par lequel on ne pouvait changer la sentence que la majorité avait déjà prononcée. Dans la cause de *Mills & Atlantic & N. W. Ry. Co.* (M. L. R., 4 S. C. 302), la Cour Supérieure (le juge Loranger) avait aussi jugé dans le même sens que le présent jugement, à savoir, qu'il suffisait que l'acte notarié fût signé par les deux arbitres (la majorité) sans le concours du troisième et sans qu'il y ait été appelé, vu que cet acte notarié n'est que la

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constatation authentique d'une sentence antérieurement prononcée à une séance où assistaient les trois arbitres, et acquise aux parties.

Comme la compagnie appelante est en possession de cet acte notarié, qui est la base de son action, elle ne peut se plaindre qu'il ne lui a pas été signifié.

L'action allègue que des témoins de la compagnie appelante n'ont pas été entendus par les arbitres ; mais la preuve détruit cette allégation.

Elle allègue encore que les témoins n'ont pas été assermentés, mais la preuve ne justifie pas cette allégation.

Elle allègue de plus que l'arbitre des intimés et le tiers-arbitre auraient eu des entrevues privées avec le curé des intimés, ce qui les aurait influencé dans leur sentence ; mais la preuve ne justifie pas cette allégation, la preuve démontre le contraire.

L'action se plaint que l'indemnité accordée est excessive et basée sur un faux principe. Mais nous n'avons pas devant nous la preuve reçue par les arbitres, et, par conséquent, nous ne pouvons constater si cela est vrai. Dans ce temps-là, il n'y avait pas d'appel de ces sentences arbitrales, et la loi—sec. 9 § 17—disait que la sentence de la majorité des arbitres "sera finale et définitive." La preuve faite en Cour Supérieure par la compagnie appelante ne démontre pas que cette indemnité est excessive ou basée sur un faux principe.

Sur le tout, la majorité de la Cour croit donc que le jugement de la Cour Supérieure qui a débouté l'action est conforme à la loi et doit être confirmé avec dépens.

CROSS and DOHERTY, JJ., dissenting, were of opinion that the award was void by reason of irregularity in the arbitrators' proceedings, and that the action should be maintained.

Judgment confirmed, Cross & Doherty, JJ., diss.

Abbotts, Campbell & Meredith for the appellants.

Taillon, Bonin & Dufault for the respondents.

(J. K.)

March 22, 1890.

Coram DORION, Ch. J., CROSS, BABY and BOSSÉ, JJ.

DORAN SCHWERSENSKI,

(*Plaintiff in Court below*),

APPELLANT;

AND

MOSES VINEBERG,

(*Defendant in Court below*),

RESPONDENT.

Receipt given through error—Parol evidence.

S. brought suit to compel *V.* to render an account of the sum of $2,500, which *S.* alleged he paid *V.* on the 6th October, 1885, to be applied to *S's* first notes maturing, and in acknowledgment of which *V.'s* bookkeeper gave the following receipt:—"Montreal, October 6, 1885. Recd. from Mr. D. S. the sum of $2,500 to be applied to his first notes maturing. M. V. (Fred.)" *V.* pleaded that he never got the $2,500, and that the receipt was given by his clerk by error, and that it should be for a case of sealskins, and not for $2,500. The clerk and other witnesses were examined without objection to prove error.

HELD:—That parol evidence is admissible in commercial matters to prove error in a written receipt given by a clerk, and that the evidence in this case proved error.

APPEAL from a judgment of the Superior Court, Montreal (TAIT, J.), Dec. 31, 1888, in the following terms:—

"The Court, etc.....

"Whereas plaintiff asks that defendant may be ordered to render him an account of the sum of $2,500 which he alleges he gave defendant on the 6th day of October, 1885, to be applied to his, plaintiff's, first notes then maturing, and in acknowledgment of which defendant, by his clerk, gave him, plaintiff, the receipt filed as plaintiff's Exhibit No. 1; but which sum defendant failed to apply as aforesaid and has refused to account for;

"Whereas defendant by his pleas denies that plaintiff gave him said sum or any sum whatever to be applied as

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aforesaid, and alleges that the receipt referred to was given by his clerk through error and by mistake, without his, defendant's authority, knowledge or consent, and was not signed by him, defendant, and that said receipt should have been given for a case of sealskins; that on said 6th day of October, plaintiff obtained large advances from defendant; that defendant held ample collateral security for all the notes he had of plaintiff on said date; that, moreover, plaintiff paid said notes himself; and that divers settlements of account were had between plaintiff and defendant since the date of said receipt, without plaintiff ever claiming the sum of money mentioned in said receipt;

"Considering that defendant did not sign the receipt dated 6th of October, 1885, in question in this cause, but that it was signed by his clerk, one Frederick Larivée;

"Considering that the evidence both for plaintiff and defendant establishes that said Larivée did not receive the sum of $2,500 mentioned in said receipt, or any part thereof, as said receipt purports to show;

"Considering that said Larivée had no authority to sign receipts on behalf of defendant for monies not received by him;

"Considering that the pretension of plaintiff (as disclosed by his witnesses Kelly and Tint) is that said sum was on said 6th day of October paid by him to defendant at his, plaintiff's office—he having taken said sum out of his pocket and paid it over to defendant without a receipt, and that a few moments afterwards he sent Kelly to defendant's office to get a receipt, and that said Larivée then, at defendant's request and dictation, wrote the receipt and delivered it to Kelly;

"Considering that plaintiff himself, in establishing that no money was paid Larivée or to defendant in Larivée's presence, to justify such a receipt, but that the money (if paid at all) was paid at his, plaintiff's office, has himself destroyed the presumption of payment arising from said receipt, and is bound to show that defendant received

said sum of money in order to justify said receipt or to hold defendant responsible therefor;

" Considering that the story told by the plaintiff's witnesses Kelly and Tint, (even if legal evidence) is improbable and undeserving of credit, and is moreover disproved; that plaintiff's financial position was then such, and his business relations with defendant of such a character as to render it highly improbable that he took $2,500 out of his pocket and paid it over to defendant on the 6th of October, 1885, at his office;

" Considering that defendant has established that the receipt was given to plaintiff himself at his, defendant's office, on the said 6th day of October, 1885, on which day defendant paid one Brazeau, on plaintiff's behalf, $2,100 to obtain the release of a case of sealskins which had been pledged by plaintiff with Brazeau, and further released plaintiff from a debt of $400, and took plaintiff's note for $2,675 to cover said two sums, and $150 for interest on said note until maturity, and that on the same day plaintiff gave defendant his letter, Exhibit A., pledging said skins as collateral security for the payment of said notes;

" Considering that on the 6th day of October, 1885, defendant held thirteen notes of plaintiff's under discount, amounting to $6,938.70, and held collateral security to a value far exceeding said sum; that all said thirteen notes were paid and settled by plaintiff without calling upon defendant to apply the said pretended sum of $2,500, or any part thereof, towards their payment;

" Considering that at the time of his assignment, in January, 1886, plaintiff did not pretend to have any claim against defendant; did not place defendant's name amongst his debtors, but on the contrary, placed defendant amongst his creditors for a large amount, without making known or pretending to have any counter claim for the sum in question in this cause; defendant's name appearing amongst his creditors mentioned in his judicial abandonment, filed as Exhibit A., as a creditor for $5,300, money lent and secured by goods and notes; and that plaintiff wrote Joseph Ullman, of New York, in January, 1886, stating that

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defendant had lent him $5,300 cash on $8,500 worth of goods, which he would have to pay before he could get his goods, and that when sued by defendant in March last, for the amount due on a promissory note, plaintiff did not by his pleas claim that defendant was indebted to him, but paid and settled said suit;

"Considering that divers settlements of account took place between plaintiff and defendant, between the month of April, 1876, and the month of February, 1888, some of which included all the standing matters between them, notably that of date November 28th, 1887, plaintiff paying monies and giving notes on account of the balance appearing due him, and that said case of sealskins was going back to him, during all which time no claim was put forward by plaintiff that defendant owed him or held in his hands said pretended account of $2,500;

"Considering that during all this period plaintiff was under obligation to pay and was paying defendant interest at the rate of 21 per cent. *per annum*, and was also getting advances from W. H. Parsons & Co. and paying them from 25 to 30 per cent. interest;

"Considering that the evidence establishes that the sum mentioned in said receipt was neither paid to Larivée nor to defendant, and that said receipt was signed in error by Larivée;

"Considering that plaintiff was under the circumstances bound to have shown how he came to have $2,500 in his pocket on the 6th of October, 1885, but that he has not even attempted to do so;

"Considering plaintiff's action unfounded;

"Doth dismiss the same with costs, *distraits* etc."

Jan. 17, 18, 1890.]

Cooke, for appellant, referred to *Bell & Arnton*, 20 L.C.J. 281, to show what kind of evidence is required to destroy a receipt.

Hutchinson, for respondent.

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The judgment was unanimously affirmed.

Judgment confirmed.[1]

Cooke & Brooke, for appellant.

Macmaster, Hutchinson & Maclennan, for respondent.

(J. K.)

June 17, 1875.

Coram DORION, Ch. J., MONK, TASCHEREAU, RAMSAY, SANBORN, JJ.

WILLIAM T. LEWIS ET AL.,
(*Plaintiffs in Court below*),
APPELLANTS;

AND

CHARLES JEFFERY ET AL.,
(*Defendants in Court below*),
RESPONDENTS.

Promissory note—Transfer without endorsement—Warranty—Laches.

HELD:—1. Where a note of a third party is transferred for valuable security, being given in payment of goods purchased, and the note is not endorsed by the transferor, a warranty is implied that the maker is not insolvent to the knowledge of the transferor.

2. If it be proved that the maker of the note was insolvent to the knowledge of the transferor, the party who received it is entitled to offer it back and claim the amount from the transferor, without asking for the rescission of the contract *in toto*.

3. Art. 1530, C. C., does not apply to such a case, and there being no time fixed by law for offering back such note, it is in the discretion of the Court to determine whether there was laches, and whether the transferor was prejudiced by the delay.

APPEAL from a judgment of the Superior Court, Montreal (TORRANCE, J.), April 30, 1874, dismissing the appellants' action.

[1] On appeal to the Supreme Court of Canada the appeal was dismissed. 14 Leg. News, 289.

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The action was brought by the appellants under peculiar circumstances. The respondents were holders of a promissory note for $400 of one James R. Lowden, a member of the firm of A. H. Lowden & Co. They applied to one Noad, a broker, to dispose of it, and Noad said probably the only way of doing so would be to purchase goods with it. He applied to the appellants who received the note, without endorsement by the respondents, in payment of 73 cases of brandy. The day after the delivery of the brandy A. H. Lowden & Co. made an assignment. Some time after the assignment the appellants became aware of it, and applied to the respondents to take back the note and settle for the brandy. The respondents refusing to take back the note, the appellants brought the present action, tendering the note, and asking for judgment for the amount.

Torrance, J., in the Superior Court, held that the action could not be maintained (18 L. C. J. 132.) The judgment was in the following terms :—

"The Court, etc.....

"Considering that the plaintiffs did not put the defendants *en demeure* with respect to said note till the 13th August, 1873, long after the defendants had sold the said brandy to one A. R. Bell, and long after it had ceased to be possible to replace the parties vendors and purchasers in the position in which they were on or about the 15th day of May, 1873, doth dismiss plaintiffs' action with costs."

The appellants' counsel submitted :—

"It will be seen that the Court below, by this judgment, placed the parties in the same position with regard to the note, as if it had been an article of merchandise with redhibitory defect, adopting the principle applicable to such cases, that where the party purchasing does not return the goods sold, he is held to have approved the sale, and to be bound by the transaction. The appellants contend that such a doctrine is not in any respect applicable to the present case. The question is not one of the sale of defective goods, or goods alleged to be different

from a sample, in both of which cases, no doubt, the rule cited by the honorable judge would apply. It is, in fact, a charge of defrauding the appellants out of 73 cases of brandy, against which fraud there is no presumption of acquiescence by the defrauded party, from the lapse of any time short of the prescription which attaches to such cases. The view taken by the appellants is not that the respondents sold to them as a piece of goods or merchandise the note in question, and took payment for it in brandy; but according to the broker's note, signed by the broker, which is the only memorandum in writing of the bargain, they sold to the respondents a quantity of goods at the market rate of the day, which the respondents took and appropriated to their own use, receiving for such goods a worthless promissory note which they say the respondents fraudulently palmed off upon them, concealing the fact well known to the respondents, and unknown to the appellants, of the insolvency of the maker of the note; and that such concealment was a direct fraud which entitled the appellants to demand payment for their brandy in the usual way, and to return the note to the parties guilty of the fraud."

DORION, Ch. J.:—

Jeffery & Co. gave a note of a member of another firm to W. F. Lewis & Co. in payment for some brandy. The next day the firm of the maker of the note went into insolvency, and the facts showed that Jeffery & Co. must have had knowledge of the fact that the note was worth very little. They gave the note, however, without endorsement, and the Court below decided that the note was transferred without any warranty. It is not to be supposed that Lewis & Co. would have accepted the note had they known the position of the maker. The English authorities are clear that where the party giving the note without endorsement knows of the insolvency he may be compelled to reimburse the value received. We say, therefore, that the sale was null, that there was fraud on the part of Jeffery & Co. in transferring the note as they

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did. The Court below said Lewis & Co. were guilty of laches in not claiming the cancellation of the sale within proper time. But there is no delay fixed by the Code; the authors say it is in the discretion of the Court. Here we think that Lewis & Co. are not too late; Jeffery has not suffered by the delay. The appeal will, therefore, be maintained and the judgment reversed.

RAMSAY, J.:—

The general principle is that endorsement is a warranty that the note will be paid at maturity, but transfer by delivery alone implies no such warranty. (Smith's Merc. Law, 295). The transferor ceases to be a party to the bill or note. It is a warranty only that the note is genuine (Smith's Merc. Law, *Ib.*; Byles, 118.) But if the transferor knew the note was worthless he would be liable. Byles, 147. We find this doctrine confirmed everywhere in reference to notes and bills of exchange. It is consonant to the doctrine of sales.

In this case, (1) did respondents know of the insolvency of the drawer? (2) Was there any laches?

The knowledge of Jeffery that the note was worthless is evident. The creditors of Lusk, Lough & Castle sought to compel the Lowdens to assign on the 19th April. On the 14th May respondents sought Noad in order to get the note disposed of, and the whole transaction was at an end on the 16th May. On the 17th the Lowdens assigned with an estate worth 26 or 27 cents at most on their unquestioned liabilities—a very insolvent estate, says Mr. Stewart, and little if anything better on the 19th of April than on the 17th of May.

But the question of laches is important. Shortly after the 23rd May, it is alleged, when they knew how matters stood, they applied to defendants to take back the note and return the brandy. What is "shortly after?" In effect they did nothing till near the end of August.

But, in the first place, laches is not pleaded. Again, the English cases cited at the bar, of *Clough* v. *North Western R. Co.*, L. R., 7 Exch. 26, and *Morrison* v. *Univer-*

sal Ins. Co., L. R., 8 Exch., both maintain the doctrine that until something is done to affirm the bargain subsequent to the knowledge of the fraud, the contract may be rescinded. The wrong-doer's position does not appear to be affected by the delay in bringing the suit. Art. 1530, C. C., does not apply. This is not an action for a redhibitory vice: it is a direct action to rescind for the fraud of the defendants.

SANBORN, J.:—

The only question decided against the appellants in the Court below was that the action was not brought in proper time. The majority of the Court here think that the right might be exercised at a later time. I would be disposed to sustain the exercise of the discretion of the Court below, were it not for the fraud that is established.

The judgment of the Court is as follows:—

"The Court, etc.....

"Considering that the appellants have proved the material allegations of their declaration, and namely that at the time the said respondents transferred to them the promissory note of James R. Lowden mentioned in the declaration in this cause, in part payment of the 73 cases of brandy sold to them by the appellants as per bought and sold note of James S. Noad & Co., brokers, produced in this cause, they the said respondents were aware that the said James R. Lowden was insolvent, and that proceedings had been adopted and were then pending against him for a compulsory liquidation of his estate under the Insolvent Act of 1869, of which circumstances the appellants were not informed at the time;

"And considering that within two days after the transfer of the said note to the appellants, to wit, on the 17th day of May, 1873, the said James R. Lowden made an assignment of his estate under the Insolvent Act of 1869 unto Andrew B. Stewart, official assignee in and for the district of Montreal;

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"And considering that although the said respondents refused to endorse the said note, they are nevertheless, under the circumstances disclosed, and by reason of their knowledge of the insolvency of the said James R. Lowden at the time they transferred the said note, bound to reimburse to the said appellants the amount thereof;

"And considering that there is no delay fixed by law within which the said appellants were bound to institute their action to recover from the respondents the amount of the said note, and that in such case it is for the Court to determine from the circumstances whether or not the parties have waived their recourse or have been guilty of such laches as might be prejudicial to those from whom they received the note;

"And considering that in the present instance the appellants have neither waived their recourse against the respondents nor been guilty of any laches by which the said respondents have received any injury;

"Considering that there is error in the judgment of the Superior Court rendered at Montreal on the 30th day of April, 1874, by which the action of the appellants was dismissed;

"This Court doth quash and annul the said judgment of the 30th day of April, 1874, and proceeding to render the judgment which the said Superior Court should have rendered, doth adjudge and declare that the transfer made by the respondents to the appellants on the 15th day of May, 1873, of the note of the said James R. Lowden, bearing date at Montreal the 20th day of December, 1872, for the sum of $400, for value received, payable six months after date to his own order at the Bank of Montreal in Montreal, in payment of the 73 cases of brandy sold by the appellants to the respondents, to be null and void, and doth grant to the said appellants act of their offer to return the said note to the respondents, and of the production thereof into Court, and doth condemn the said respondents to pay to the said appellants the sum of $400 with interest from the 24th day of September, 1873, date of service of process, together with the costs in-

curred as well in the Court below as on the present appeal."

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Judgment reversed.

Abbott, Tait, Wotherspoon & Abbott for appellants.

Perkins, Macmaster & Préfontaine for respondents.

(J. K.)

November 27, 1890.

Coram DORION, Ch. J., TESSIER, BABY, BOSSÉ and DOHERTY, JJ.

WILLIAM WATSON,
(*Plaintiff in Court below*),
APPELLANT;

AND

WILLIAM JOHNSON,
(*Defendant in Court below*),
RESPONDENT.

Pledge of goods for pre-existing debt—Transfer of bill of lading—R.S.Q. 5646.

HELD:—That the transfer of goods, then stored in New York, by a debtor apparently solvent, to his creditor, by endorsement of the bill of lading, as security for an antecedent indebtedness as well as for a note at the time discounted by the creditor, is valid, and the creditor may apply the proceeds of the pledge to the antecedent debt, and recover on the note discounted at the time.

APPEAL from a judgment of the Superior Court, Montreal (WURTELE, J.), Feb. 5, 1889, in the following terms:—

"The Court having heard the plaintiff, and the defendant, William Johnson, on the merits of the issue in this cause between them, the other defendant, John Jamieson, having made default to appear, examined the proceedings, proof of record and evidence adduced, and deliberated;

"Seeing that the plaintiff seeks to recover the amount,

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in capital, interest and costs of protest, of a certain promissory note, made and signed at Montreal on the 8th August, 1888, by the defendant, William Johnson, under the style and signature of William Johnson & Co., in favor of the other defendant, John Jamieson & Co., for the sum of $792.67, payable four months after date, and endorsed and transferred, for value received, by the said John Jamieson to the plaintiff;

" Seeing that it has been proved that the said promissory note was left by the defendant, William Johnson, in the hands of the other defendant, John Jamieson, for the latter's accommodation, and that the latter had agreed to pay the same as if he had been the maker thereof, and therefore primarily liable therefor;

" Seeing that it has been established in evidence that the said promissory note was negotiated and discounted by the plaintiff for the defendant, John Jamieson, on the 23rd of August, 1888, and that at the same time the latter transferred to the plaintiff thirty-five cases of gum as collateral security for advances, by endorsing the bill of lading therefor to the plaintiff;

" Seeing that the plaintiff has appropriated to his own use and for his personal benefit the said thirty-five cases of gum, and that the value thereof was $1,500, exceeding the amount of said promissory note, and of another promissory note negotiated and discounted at the same time, but which was paid at maturity;

" Seeing that the plaintiff contends that at the time he accepted the said collateral security, the defendant, John Jamieson, was liable to him in the sum of $3,168.10, for previous advances and promissory notes, previously negotiated and discounted by him for the said defendant, John Jamieson, and that the said collateral security covered both the said previous advances and the advances made at the time of the endorsement of the bill of lading of the said thirty-five cases of gum;

" Considering that the said collateral security was so given under the authority and in virtue of Chapter 54 of the Consolidated Statutes of Canada, and that under and

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in virtue of section 9 of the said Chapter (now Article 5646 of the Revised Statutes of Quebec), collateral security by means of the endorsement of a bill of lading can only be validly given to secure the payment of a bill or a note negotiated, or of a debt contracted at the time of such endorsement;

" Considering, therefore, that the collateral security so given by the defendant, John Jamieson, was restricted to the advances made on the two promissory notes, discounted at the time the bill of lading was endorsed over, and that the proceeds or value thereof must be imputed upon the promissory note now sued upon, the other having been paid at maturity;

" Considering that the defendant, John Jamieson, who gave the collateral security, was primarily liable for the said promissory note now sued upon, and that by the said imputation he only pays with his own means his own debt, and that the other defendant, William Johnson, should have the benefit of such imputation;

" Considering that the said promissory note now sued upon was paid and discharged by the plaintiff having appropriated to his own use and personal benefit the said thirty-five cases of gum long before the institution of this action;

" Doth dismiss the action in this cause, with costs, of which distraction is granted etc."

Sept. 17, 18, 1890.]

M. Hutchinson, for appellant:

The section of the Revised Statutes of Quebec to which reference has been made in the judgment reads as follows:—5646. " No such cereal grains, goods, wares, or " merchandise, shall be held in pledge for any period ex- " ceeding six months; and no transfer of any such bill of " lading or receipt shall be made to secure the payment " of any bill, note or debt, unless the same is negotiated " or contracted at the same time with the endorsement of " such bill of lading or receipt."

But what is to prevent two persons making any agree-

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ment they think proper as to the disposition of property, so long as the rights of third parties are not prejudiced, and so long as there is nothing done against good morals or public policy? At the time of the transfer of these thirty-five cases of gum to the appellant, John Jamieson was the sole proprietor of the gum, and there was no question as to his solvency. There was nothing at that time to prevent John Jamieson paying any creditor in full, or to prevent him transferring this gum to the appellant, either as payment for previous advances or as security for previous advances. Appellant believed at that time that Jamieson was perfectly solvent. Johnson, the respondent, had no interest whatever in this gum. Moreover, he got value for the note sued on, namely, a note for $1,161 made by John Jamieson & Co., which he (Johnson) preferred to the cash proceeds of his own note. Can the respondent, Johnson, therefore, pretend that because John Jamieson transferred this gum to appellant as security for previous advances, at a time when he (Jamieson) was believed by everybody to be perfectly solvent, and because appellant applied this gum in payment of such previous advances, that he (Johnson) can get the benefit of this gum in which he had no interest whatever, and be absolutely discharged from the payment of his note, for which he got value from Jamieson, and which appellant took in good faith, for value, and before maturity?

The provisions of law mentioned in the judgment cannot prevent two persons making what agreement they think fit between themselves, but in any event the respondent, Johnson, should be condemned to pay his note, and if this gum has been wrongly appropriated by the appellant, it is for the curator of the estate of John Jamieson to complain, and not for the respondent Johnson.

But this provision of law mentioned in the judgment has in reality no application to the case in question. Under the old Statute 22 Vict., Ch. 59, which was "An Act respecting Incorporated Banks," it was provided

that, " No such cereal grains, goods, wares, or merchan- " dise shall be held in pledge by such Bank or private " persons, for any period exceeding six months: no trans- " fer of such bill of lading, specification of timber, or " receipt shall be made under this Act, to secure the pay- " ment of any bill, note, or debt, unless such bill, note or " debt be negotiated or contracted at the same time with " the endorsement of such bill of lading, specification of " timber, or receipt; " and it is from this Statute that the section in the Revised Statutes of Quebec above quoted is taken, so that this legislation really applies only to Banks, and not to private persons. But by reference to 5643 of the Revised Statutes of Quebec, it will be seen that it was the intention of the legislature that such a provision of law should apply only to bills of lading and warehouse receipts given in this Province, and covering goods stored or deposited, or intended to be stored or deposited, in this Province. In the case in question, the thirty-five cases of gum were stored in New York, and were not intended to be stored in this Province, and therefore this Statute does not reach or apply to the goods in question.

Trenholme, Q.C., for the respondent:—

James Leggat, who acted for appellant in the transaction in which the gum was pledged, says that the pledging was done simply by giving to him for appellant the documents of title. The gum was subsequently obtained and appropriated to his own use by appellant, and as its value exceeded the amount of the advances made by appellant at the time of the pledging, the respondent pleaded that his note sued on by appellant in this case was paid and extinguished by the value or proceeds of the gum so appropriated by appellant. The appellant tried to avoid the application of the price of the gum to the payment of respondent's note, by seeking to apply the gum as collateral security for antecedent advances which he alleges he had made to Jamieson prior to the time that he made the advance on respondent's note when the gum was pledged. Respondent maintains that it is impossible for appellant to apply security acquired by him by the

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pledging to him of the document of title to other advances than those made at the time of the pledging, and that the Court below rightly so held, and that as the price of the gum appropriated by appellant exceeded the advances made by appellant at the time of the pledging, including the advance on respondent's note sued on, such note must be held to be paid and satisfied. The following cases were cited :—*Perkins & Ross*, 6 Q.L.R. 65, *Robertson & Lajoie*, 22 L.C.J. 169, *Hotte & Currie*, 2 Leg. News, 348.

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Bossé, J., delivered the judgment of the majority of the Court, holding that the transfer of the gum for antecedent advances was valid, and reversing the judgment of the Court below for the following reasons :—

" Considérant que l'article 5646 des Statuts Révisés de la province de Québec est exorbitant du droit commun, et qu'en autant il doit être strictement interprété et son application restreinte aux seuls cas qui y sont spécialement mentionnés ;

" Considérant qu'il est amplement prouvé au dossier que les trente-cinq boîtes de gomme données en gage l'ont été non seulement pour garantir le paiement du billet promissoire alors escompté, mais aussi pour la garantie des autres dettes existantes et antérieurement contractées ;

" Considérant que les dites trente-cinq boîtes de gomme ne se trouvaient alors dans aucune des conditions mentionnées dans le dit article 5646, et qu'en autant le contrat de gage tel que prouvé est valide entre les parties ;

" Considérant que les dites dettes antérieurement contractées et existant lors du dit contrat de gage sont plus que suffisantes pour couvrir la valeur de la dite gomme, et que le montant que le demandeur a dû percevoir sur icelle gomme a été plus qu'absorbé par les dites dettes, et que partant le défendeur William Johnson est resté débiteur du montant du billet réclamé en la présente cause, et qu'il y a, en autant, erreur dans le jugement de la

Cour Supérieure siégeant à Montréal le 5 février 1889, dont est appel ;

" Cette Cour casse et annule le dit jugement, et procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, condamne le défendeur William Johnson à payer à l'appelant la somme de $795.69, avec intérêt sur $792.67 à compter du 11 déc. 1888, et sur $3.02 du 14 déc. 1888, date de l'assignation, avec dépens contre le défendeur William Johnson, tant en Cour Supérieure qu'en appel. *Dissentiente* l'hon. Juge Tessier."

Judgment reversed.

M. Hutchinson, for appellant.

Trenholme, Taylor & Buchan, for respondent.

(J.K.)

November 27, 1890.

Coram DORION, Ch. J., BABY, BOSSÉ and DOHERTY, JJ.

WILLIAM R. BROCK ET AL.
(*Plaintiffs in Court below*),
APPELLANTS ;

AND

JAMES F. GOURLEY
(*Defendant in Court below*),
RESPONDENT.

Sale of goods—Order obtained by commercial traveller—Acceptance.

HELD :—In law, and by the custom of trade, the mere taking of an order for goods by a commercial traveller does not complete the contract of sale so long as the order has not been accepted by his principal. And where the latter refuses to accept the order, and gives notice to the person from whom the order was taken, he is not liable in damages.

APPEAL from a judgment of the Superior Court, Montreal (JETTÉ, J.), June 30, 1888, as follows :—

" La Cour etc.....

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"Attendu que les demandeurs se pourvoient contre le défendeur en recouvrement d'une somme de $162.96, balance sur le prix de marchandises antérieurement livrées ;

"Attendu que le défendeur admet cette dette, mais offre en compensation de cette somme celle de $196 09 qu'il soutient avoir droit de réclamer des demandeurs à raison de la non-livraison par ces derniers de cent dix pièces de marchandises (Halifax Tweeds) qu'ils s'étaient engagés à fournir au défendeur suivant ordre en date du 26 novembre 1886, par eux accepté, mais qu'ils ont ensuite négligé de remplir et exécuter ;

"Attendu que le défendeur établit les dommages par lui réclamés en disant que d'après son marché avec les demandeurs, la marchandise susdite à lui vendue à raison de 27½ c. la verge moins cinq par cent. de remise, lui revenait à $775.91, tandis qu'aussitôt après l'avoir achetée il l'avait revendue à un profit net de cinq à sept centins et demie la verge, formant en tout $972, soit un profit net de $196.09 qu'il est en droit d'exiger des demandeurs, en ayant été privé par leur faute ;

"Attendu que les demandeurs ont répondu qu'ils ne se sont pas engagés d'une manière absolue à livrer les dites marchandises au défendeur ; qu'au contraire, lors du marché ils lui ont donné à entendre qu'ils pourraient ne pas être en état de fournir toute la quantité stipulée, et ne s'engageaient pas à le faire ; et de plus, que d'après l'usage reconnu du commerce en tel cas, l'ordre donné par le défendeur était sujet à l'acceptation des demandeurs et à la condition qu'ils auraient les dites marchandises en magasin à cette époque ; enfin, que trois jours après réception du dit ordre ils ont informé le défendeur qu'ils n'avaient pas la quantité promise de la marchandise en question et n'en pouvaient livrer que trente pièces, mais que le défendeur a refusé cette offre ;

"Attendu que l'ordre donné par le défendeur aux demandeurs, et sollicité et accepté par l'agent autorisé de ces derniers, ne comporte aucune réserve ou condition telle que celle alléguée par les demandeurs ; qu'il n'est

pas prouvé non plus que les demandeurs aient répudié le dit ordre dès qu'ils en ont été informés, et qu'il n'est pas établi que la lettre du 29 novembre 1886, adressée au défendeur, lui soit parvenue;

"Attendu qu'il résulte au contraire de la correspondance échangée entre les parties, que le défendeur parait être toujours resté sous l'impression que l'obligation des demandeurs à son égard était absolue et devait être remplie;

"Attendu que la condition présumée invoquée par les demandeurs, que l'ordre n'était obligatoire pour eux qu'en autant qu'ils avaient les marchandises en magasin, lors de la réception d'icelui, est contredite et repoussée par la stipulation y contenue que la livraison des dites marchandises n'auraient lieu qu'après un délai de sept semaines, et par le fait prouvé que les demandeurs se pourvoient dans les manufactures de la quantité de marchandises par eux requise, à raison des commandes qu'ils reçoivent;

"Attendu que la coutume ou l'usage invoqué par les demandeurs, et aux termes duquel les ordres comme celui donné par le défendeur sont toujours sujets à répudiation par le principal lorsqu'il n'a pas la marchandise vendue par son mandataire, n'est pas clairement prouvée; qu'elle est au contraire fort incertaine et même absolument contredite par certains témoins;

"Attendu que dans ces circonstances l'engagement des demandeurs reste entier et absolu et doit être appliqué dans les termes mêmes dans lesquels il est conçu;

"Attendu que le défendeur a prouvé que du moment qu'il a eu l'engagement des demandeurs pour la livraison des dites cent dix pièces de marchandise, il en a de suite vendu cent pièces à un profit net de deux centins et demi la verge; et qu'il aurait facilement pu vendre les dix autres pièces à un profit plus élevé; qu'en conséquence le profit qu'il a manqué de faire sur cette marchandise (en prenant une moyenne de vingt-sept verges par chaque pièce) s'éleverait à $74.25, à quoi il faut ajouter pour la remise de cinq par cent sur le prix d'achat une autre

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somme de $40.80, formant en tout $115.05; et que par suite la réclamation du défendeur est fondée jusqu'à concurrence de ce dernier chiffre;

"Attendu qu'en déduisant cette dite somme de $115.05 de celle de $162.96, et en déclarant celle-ci compensée pour autant jusqu'à concurrence de celle-là, il reste une balance finale de $47.91 en faveur des demandeurs;

"Maintenant l'exception du défendeur pour autant, déclare la demande compensée et éteinte jusqu'à concurrence de la dite somme de $115.05, et en conséquence ne condamne le défendeur à payer que la somme de $47.91, avec intérêt du dix juin 1887, jour de l'assignation, et les dépens d'une action de cette classe, distraits à Mtres Hague & Hague, avocats des demandeurs, mais condamne les demandeurs aux frais de contestation sur ce chiffre de $115.05, distraits à Mtres Greenshields, Guerin & Greenshields, avocats du défendeur."

Sept. 18, 1890.]

H. Abbott, Q. C., for appellants:—

The claim of appellants being admitted, the only question to be decided is whether respondent's counter claim for damages, owing to an alleged breach of contract on the part of the former, is well founded.

The main question to be decided on the appeal is of considerable importance, viz., whether the orders taken by a commercial traveller are binding absolutely on his principals, or are subject to acceptance or refusal by them.

The facts of the case, as they appear in the pleadings, are as follows:—

The appellants are a wholesale dry goods firm of Toronto, trading there under the name of W. R. Brock & Co. The respondent is a retail clothier of Montreal.

The declaration sets out a simple assumpsit for $162.96, balance due upon goods sold and delivered.

The respondent, admitting the debt, pleads compensation as follows:—

He alleges that on or about Nov. 26, 1886, he bought from the appellants through their authorized agent, one

John Dudgeon, 110 pieces, amounting in all to 2,970 yards of Halifax tweed, at the price of 27½ c. a yard, with a discount of five per cent. off if paid within thirty days; that after so purchasing he resold 2,700 yards to Messrs. Gault Brothers of Montreal, at an advance of five cents per yard, and the remaining 270 yards elsewhere in the city of Montreal, at an advance of 7½ c. per yard, thus making a total profit of $196.09; that the appellants failed to deliver the said goods according to their contract, and respondent in consequence suffered damage to the amount of the profit lost ($196.09); that the appellants are indebted to him in that sum, and that their claim is thereby compensated and extinguished.

To this plea, the appellants answered that no absolute sale of the Halifax tweeds in question ever took place; that when respondent ordered them from the agent of the appellants he was given to understand that the appellants might not be able to supply the full amount of his order, and did not bind themselves to do so; that shortly after the pretended contract, the appellants offered to deliver to the respondent thirty pieces of the said goods; that the respondent did not accept this offer, and the goods were consequently not delivered; that further, by law and the custom of trade, the order was subject to acceptance by the appellants, and to their having the goods detailed, in stock.

The respondent replied generally, and also specially denied the existence of any such custom of trade as that set up by the appellants.

After proof, the Judge of the Court below held that the respondent had established a breach of contract by appellants, and allowed his claim of compensation to the extent of $115.05.

The appellants contend that the sale in question has not been proved.

The order is not a contract of sale. It is a mere memorandum purporting to be a copy of a communication from an agent to his principals. The respondent has adduced no evidence to extend or change its meaning, and in the

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absence of such evidence, the Court is not justified in treating it as other than it purports to be.

In regard to the law and custom of trade bearing upon the case, it is submitted that even had Mr. Dudgeon, the commercial traveller, not expressed any doubt as to his principals being able to supply the full amount of the order, they would not either in law or by custom of trade be liable, unless they had expressly signified their acceptance of the order taken by him.

A commercial traveller is not a general but a special agent, and his authority is of a special character, limited both by law and custom of trade. He has not, as such, authority to conclude a sale, and definitely to bind his principals to deliver goods ordered. His powers only go to the extent of taking orders, which his principals may accept or reject. If he had been entrusted with the possession of the goods, the position would have been different. In such a case the law would presume authority to sell (C.C. 1739, 1740). In support of this contention, appellants refer to the following authorities :

Dalloz, P. 49-2 36,37.

" Dict, Vo. Mandat No. 139.

" " Vo. Compétence Commerciale Nos.445, 446.

" Jurisp. Générale 1885, p. 260, Notes 1 and 2.

"Il ne peut donc obliger de plein droit son commet-"tant, surtout lorsque la réserve d'une ratification a été "portée à la connaissance des tiers."

Rev. de Dr. Comm. 1885, p. 376. Decision of the Cour d'Appel de Bordeaux. "Les marchés faits par commis-"voyageurs ne deviennent définitifs que par la ratifica-"tion du patron."

Massé, Dr. Comm. II. § 97.

Pardessus, Dr. Comm. I. § 251.

The precise nature of a commercial traveller's powers is not only a matter of law, but is to a certain extent dependent upon the custom of trade. In the present case there is ample proof that the taking of the order by the commercial traveller, does not, by custom of trade, amount to an engagement on the part of the principals to deliver

the goods. The taking of such an order is, in all cases, subject to the goods being in stock.

To sum up the position of appellants, they contend that the judgment should be reversed on the following grounds:—

1. The respondent was given clearly to understand by the commercial traveller, at the time he ordered the Halifax tweeds in question, that his principals, the appellants, might not be able to fill his order, and consequently he was aware that it was subject to refusal by them.

2. The order for the Halifax tweeds in question, though taken by the appellants' commercial traveller, was neither expressly nor tacitly accepted by them.

3. In law, and by custom of trade, the mere taking of an order by a commercial traveller does not bind his principals to deliver the goods ordered.

4. The principals in this case, the appellants, had the right to refuse such order; and the fact that the goods were sold out, and so could not be supplied, constituted a valid reason for such refusal, if any were needed.

5. In the present case, the order was refused by the appellants, and the respondent was duly notified of such refusal within a few days after the order was taken by the traveller.

6. Although the respondent denies receiving the letter containing the refusal, the circumstances of the case are sufficient to create a legal presumption that he did receive it, and knew of such refusal.

7. The appellants are shown to have acted in good faith, and to have taken all proper precautions, and to have done all in their power to meet the wishes of the respondent, and the respondent is shown to have acted negligently, and in bad faith, with regard to the transaction in question.

8. The damages set up by the respondent are not clearly proved to have been suffered by him.

Greenshields, Q. C., for the respondent:—

To relieve themselves of responsibility the appellants rely on two allegations of their answers to respondent's

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plea, namely, that appellants did not bind themselves, absolutely, to deliver to the respondent the goods mentioned in the said plea; and further, that by a custom of trade in such matters, an order given by respondent to appellants' agent, was subject to acceptance by appellants, and to their having the goods in stock.

As to the first, respondent submits that the evidence of the said sale is contained in the written order, signed by appellants' agent, duly authorized for that purpose, and that it is an unconditional and absolute contract on the part of appellants to deliver the goods mentioned within the time mentioned in said order. Part of the goods mentioned in the order were regularly delivered, but the appellants failed to deliver the 110 pieces of Halifax tweed in question. There is no evidence whatever, to show that respondent ever received the letter of the 29th November, mentioned in appellants' answer to plea; but, as appears from the respondent's letters to appellants, respondent constantly urged appellants to make delivery of said goods.

Respondent further submits that there is no proof of a custom of trade, such as the appellants seek to invoke. The appellants' witnesses have failed to prove the existence of any such custom or usage in the trade, and the evidence of the respondent's witnesses goes to show that such a usage is unknown among merchants.

Nov. 27, 1890.]

DOHERTY, J. (for the Court):—

The plaintiffs sue on an account for goods sold and delivered. The defendant admits the account, but asserts a right to set off a claim for damages, alleging that on the 26th November, 1886, he gave an order for Halifax tweeds to the plaintiffs' commercial traveller; that he has not received these goods; and that he has suffered loss by not having them to supply orders. The plaintiffs answer: "the order was not a sale; our traveller gave you to understand at the time that it was doubtful whether we could supply the quantity ordered."

The order was taken on the 26th November, 1886. When the traveller got home he found that his firm had not the particular description of Halifax tweeds in stock, and he wrote the respondent as follows:—

TORONTO, November 29th, 1886.

MR. J. F. GOURLEY,
Montreal.

DEAR SIR: Since coming home, I have gone fully into the matter of low-priced Halifax tweeds, and find that we are over-sold some 150 pieces. We wired the mills as to repeat price, but they will not make the goods again at any figure. We can deliver you 15 pieces of each of the two shades you ordered 50 each of, and some 20 pieces of this shade (see samples). Those we can ship at once. I am truly sorry that this should have happened, but you will remember I had my doubts as to being able to deliver them in large quantities. Please send me reply, either by wire or by letter, as to whether I shall send these 30 pieces on now, or hold them until we forward your spring parcel.

I remain, Yours very truly,

JNO. DUDGEON.

Please address answer to me.

To this letter he got no reply. The respondent denies that he received it. On the 17th December, the traveller sent a post card in the following terms:—

TORONTO, December 17th, 1886.

MR. J. F. GOURLEY.

DEAR SIR: I wrote to you over two weeks ago, regarding Halifax tweeds. Did you ever receive the letter?

Yours very truly,

JOHN DUDGEON.

No answer to this was received. On the 29th January, 1887, the appellants wrote again, offering Canadian tweeds, and with reference to the Halifax tweeds, stating the number of pieces they could furnish. The respondent wrote for the first time in reply to this, stating that the order he gave Mr. Dudgeon would be all he required. On the 10th February the respondent wrote again, asking when he could expect the Halifax tweeds at 27½ cents. This was the first time he referred to the Halifax tweeds,

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though the goods were to be delivered about the 15th January. On the 22nd February he made a demand for the tweeds.

We are of opinion that there could be no sale until the principals had signified their acceptance of the order taken by their agent. By their letter of 29th November the respondent was notified that the order could not be filled. He says he never received that letter. The presumption to my mind is that he did get the letter, and if he did, there is no difficulty in rejecting his claim of compensation.

Besides the rule of law applicable to the contract of sale, the plaintiffs' witnesses establish the existence of a custom of trade, to the effect that an order taken by a travelling agent must be approved and accepted by his principal before any sale is completed. This seems a very reasonable usage, as otherwise agents might outsell their employers on any line of goods, and expose them to actions of damages.

Our conclusion is that it was not a sale. The judgment will therefore be reversed.

The judgment is as follows :—

"The Court etc.....

"Considering that plaintiffs have established the material allegations of their declaration and of their amended answer to defendant's plea to this action, as well by the admissions in said plea made and given as by other legal and sufficient evidence by them therein made;

"And considering that defendant hath failed, both in law and in fact,.to establish and make good the plea and *défense* by him pleaded and made to this action, to wit, a plea of compensation based upon alleged damages by him sustained by reason of plaintiffs' failure to deliver to him goods alleged to have been bought by him from them, and by him alleged to have been resold at an advance price to other parties;

"Considering, therefore, that there is error in the judg-

ment now appealed from, to wit, the said judgment of the Superior Court rendered on the 30th day of June, 1888, at the City of Montreal, in this, that said judgment maintained defendant's said plea of compensation and dismissed plaintiffs' action *pro tanto*;

"Doth set aside, annul and make void the same;

"And the Court now here, rendering the judgment which the Court below ought to have rendered, dismissing said plea and *défense* to this action, doth adjudge and condemn the defendant to pay plaintiff the sum of $162.96, with interest as prayed for from date of service of process, and costs as well of this Court as in and of the Court below."

Judgment reversed.

Abbotts, Campbell & Meredith for appellants.

Greenshields, Guerin & Greenshields for respondent.

(J. K.)

[IN CHAMBERS.]

October 14, 1891.

Coram CROSS, J.

EX PARTE

HENRY WOODS, Petitioner for writ of Habeas Corpus.

Procedure in criminal cases—Writ of error—R.S.C. Ch. 174, S. 265.

HELD:—That the issue of a writ of error will interrupt a sentence which has been partially undergone before the issue of the writ; and in such case, where the offence is a misdemeanor, the prisoner may be admitted to bail.

The petitioner represented that on the 9th July, 1891, he was condemned under The Speedy Trials Act by the Court of Special Sessions of the Peace, to "pay a fine of $100 or stay in jail until it was paid," for having illegally appropriated a horse and buggy by temporarily depriving

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the owner of the use thereof, under section 85 of the Larceny Act. The Court used the power conferred by Cap. 181, R. S. C., sect. 31, to impose a fine, but the unlimited imprisonment in default of payment was illegal.

As under R.S.C. Cap. 175, sect. 4, the Court of Sessions of the Peace is a Court of Record, petitioner's only recourse against this judgment was by writ of error, for which he obtained the fiat of the Attorney General, and the case was fixed for hearing at the ensuing term of the Court of Queen's Bench sitting in Appeal.

The Procedure Act, section 265, says that the issue of the writ of error shall in the Province of Quebec operate a stay of the execution of the sentence, and to obtain the benefit of this provision of the law petitioner applied for the issue of the writ of Habeas Corpus, and asked to be liberated on bail to appear at the next term of the Court of Queen's Bench sitting in Appeal, to abide the decision on the writ of error.

Petitioner complained also that the committimus was null and void inasmuch as it contained the words "with hard labour," which are not in the sentence.

The following authorities were quoted in support of the application: *R.* v. *Spelman*, 14 L. C. J. p. 281; Harris, 4th edition p. 500; Dandurand & Lanctot, p. 566; Clarke's Criminal Law of Canada, pp. 539 and 555; *Ex parte Burns*, Ramsay's Appeal Cases, 188; Hurd on Habeas Corpus, pp. 327 and 329.

St. Jean, for the Crown, opposed the application, and referred to the authorities quoted in Taschereau's Criminal Law of Canada under section 265 of The Procedure Act, which laid down the principle that the right to be liberated pending the proceedings under the writ of error could not be granted to a prisoner who had partly undergone his sentence, unless there was special statutory provision to that effect. The writ of error could stay the execution of the sentence, but could not interrupt it. Thus the English Statutes made special provision for bail in such cases, while the Canadian Statute did not.

CROSS, J., said he would grant the application. The

only way to give effect to sect. 265 of the Procedure Act, which says that the issue of the writ of error shall stay the execution of the sentence, was in the manner adopted by the petitioner, as otherwise the penalty would be continued and this provision of the law rendered inoperative. Section 267 of the Procedure Act gave the Court of Appeal power to pronounce the proper judgment in the case appealed by writ of error, and petitioner was practically in the position of a prisoner before judgment rendered, and the offence charged in this case being a misdemeanor, bail should be accepted. In the case of *R.* v. *Spelman*, where the offence was a felony, bail had been accepted. His honor considered that although at common law the remedy did not exist, yet our statute declaring that the writ of error operated a stay of execution of the judgment, had the same effect as the English Statutes which, however, were more explicit in declaring that upon the issue of a writ of error a defendant in misdemeanors could be bailed. It would have been better if our statute had been equally explicit and had contained the declaration that a defendant for misdemeanor in like case could be bailed, but a reasonable interpretation of our statute gives it that effect. While the writ of error was pending the defendant was in the same position as if no sentence had been pronounced against him. The sentence was not final, therefore his position was as if an undecided charge of misdemeanor remained against him. He would fix the bail at $400 for the prisoner personally, and two sureties at $200 each.

W. A. Weir, for Petitioner.

E. N. St. Jean, for the Crown.

(W. A. W.)

November 26, 1891.

Coram LACOSTE, Ch. J., BABY, BOSSÉ, and WURTELE, JJ.

WILLIAM M. WALBANK,
(*Plaintiff in Court below*),
APPELLANT;

AND

PROTESTANT HOSPITAL FOR THE INSANE
(*Defendant in Court below*),
RESPONDENT.

Architect—Submission of Plans—Contract—Damages.

The plaintiff, an architect, in response to a public advertisement, offered plans in competition for a building about to be erected by the defendant, on being assured by the president of defendant's board that all the plans sent in would be submitted to disinterested experts before a choice was made. The plans were not submitted to experts, and those finally adopted were submitted by an architect who was not a competitor within the terms of the public advertisement.

HELD:—That the plaintiff was not entitled to damages, it being evident that the defendant was not bound to adopt the plans which might be recommended by the experts, and no partiality or bad faith in the selection being proved.

APPEAL from a judgment of the Superior Court, Montreal (TAIT, J.), Dec. 4, 1889, in the following terms:—

"The Court, having heard the parties by their respective counsel upon the merits of this cause, examined the proceedings and proof of record, heard also the witnesses in open court and deliberated;—

"Considering that plaintiff has failed to prove the material allegations of his declaration, and particularly has failed to prove that the plans and specifications sent in by him in answer to the advertisement published by defendants complied with the terms of said advertisement;

"Considering that said plans and specifications were not accompanied by any statement or estimates showing

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Lacoste, C. J.

that the cost of the proposed building would not exceed $80,000, the limit fixed by said advertisement, and that, although plaintiff alleges in his declaration that he prepared such estimates, there is no proof that he did so or that he ever furnished them to defendants;

"Considering that defendants were not bound to accept said plans or specifications, nor was there any obligation on their part toward him to submit the same to Dr. Buck, of Toronto, and other independent experts, as alleged in his declaration;

"Considering that plaintiff has failed to prove any contract, express or implied, on defendants' part to pay for such plans and specifications, or any misrepresentation or bad faith in their dealings with him, and that his action is unfounded and unsupported by proof, and that, moreover, the material allegations of defendants' pleas are established;

"Doth dismiss plaintiff's action with costs, *distraits* etc."

Sept. 23, 24, 1891.]

R. C. Smith, for appellant.

L. H. Davidson, Q. C., for respondent.

Nov. 26, 1891.]

LACOSTE, Ch. J.:—

Appel par le demandeur du jugement qui déboute son action.

L'action est pour $2,000, valeur de plans et devis, et $2,000 de dommages, en tout $4,000.

L'appelant allègue que le 20 oct. 1887, l'intimée a fait insérer dans les journaux l'avis suivant:—

"Protestant Hospital for the Insane."

Province of Quebec.

To Architects.

Plans and specifications are invited for the erection of the main building of the above Hospital, on the latest improved scientific and economical principles; cost not to exceed $80,000, to include heating, water and ventilation.

Accommodation for 250 patients, exclusive of staff.

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The site is situated three miles from the city, on the Lower Lachine Road.

Plans required on or before 1st December.

For further information apply to

G. B. BURLAND, President,

Oct. 20th. Montreal.

Ayant lu cet annonce, l'appelant est allé trouver Burland, le président, pour s'enquérir si les compétiteurs seraient traités franchement, et il l'informa que, d'après la rumeur, une promesse avait été faite à Hopkins d'accepter ses plans. Burland lui répondit que la rumeur était fausse, que la décision serait impartiale vu que les plans seraient d'abord soumis à un Dr. Buck de Toronto et à deux autres spécialistes experts dans ces genres de construction, et, qu'après avoir pris leur avis, le bureau des gouverneurs de l'asile déciderait lequel des plans serait adopté.

En parlant ainsi, ajoute l'appelant, le président a obligé l'intimée à remplir ces conditions et à soumettre les plans aux experts.

L'appelant a préparé les plans et devis et les a livrés le 30 novembre.

L'intimée n'a pas soumis les plans aux experts, mais son bureau de gouverneurs, ou un comité de ce bureau a choisi le plan de Hopkins qui n'était pas un des compétiteurs aux termes de l'avis, qui n'avait pas produit ses plans dans le temps fixé, qui n'avait pas fait de devis et dont les plans n'étaient pas conformes à l'annonce en ce qu'ils ne pourvoyaient pas au drainage, à la ventilation, etc.

L'appelant allègue, de plus, que le choix des plans de Hopkins a été le résultat du favoritisme et a été fait en violation des conditions de l'annonce ; enfin, que ses plans lui ont été remis endommagés et que ses devis ne lui ont pas été remis.

Il conclut à ce que ordre soit donné à l'intimée de soumettre les plans au Dr. Buck et à deux autres experts, pour que, sur leur rapport, le bureau des gouverneurs fasse son choix, et qu'à défaut de se conformer à cet ordre,

l'intimée soit condamnée à lui payer les dommages et la valeur de ses plans.

L'intimée a plaidé que les plans et devis de l'appelant n'étaient pas en conformité avec les conditions de l'avis; que l'intimée n'était pas tenue d'accepter aucun des plans ni d'en payer aucun, et qu'elle a fait son choix de bonne foi, et n'a usé d'aucune fraude; que, par oubli, elle n'avait pas remis les devis à l'appelant lors de l'action, mais qu'elle les lui a remis avant le retour de l'action.

Je n'aurais pas été disposé à baser le jugement sur la non-conformité des plans avec les données insérées dans l'annonce.

L'intimée se plaint qu'il a demandé les plans d'une bâtisse pouvant accommoder 150 patients, et les plans de l'appelant sont faits pour loger 162 patients.

Le coût de la bâtisse est fixé a $80,000 dans l'avis. L'intimée prétend que le coût de la bâtisse, d'après les plans de l'appelant, aurait été de $98,000, et elle base cette assertion sur le fait qu'une soumission pour la construction de la bâtisse, d'après les plans de l'appelant, aurait été produite en même temps que les plans, et qu'aucune autre estimation du coût n'accompagnait les plans.

Des plans étaient demandés pour une bâtisse de $80,000. En produisant ses plans, l'appelant n'était pas tenu de mentionner le coût de la construction. Il était présumé être de $80,000. La soumission n'était pas faite par l'appelant. C'était celle d'un tiers, Bastien. Cette soumission ne devait être ouverte qu'au cas d'acceptation des plans de l'appelant.

Quant à la différence de 150 à 162 patients, ces deux chiffres sont assez rapprochés pour me faire dire qu'il n'y avait pas une différence fatale entre les plans demandés par l'intimée et ceux fournis par l'appelant.

D'ailleurs, l'intimée n'a pas répudié ces plans de l'appelant; elle les a soumis avec les autres aux actionnaires de la compagnie.

Moi, pour un, je n'aurais pas aimé à baser ma décision sur ces points.

L'appelant ne prétend pas que l'intimée était tenue d'ac-

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cepter le meilleur plan, ni aucun d'eux, mais seulement qu'elle devait, avant de faire son choix, les soumettre à des experts désintéressés.

L'appelant ne dit même pas que l'intimée était tenue d'accepter ceux qui seraient suggérés par les experts. Le bureau des gouverneurs, même d'après les prétentions de l'appelant, devait faire finalement le choix.

Puisque l'intimée n'était pas obligée d'accepter, l'appelant ne peut pas la poursuivre pour dommages parce qu'elle n'a pas accepté. Les dommages naissent de l'inexécution d'une obligation. Il ne peut y avoir inexécution d'obligation quand il n'y a pas eu d'obligation. Si, lors de l'annonce, les gouverneurs de l'intimée avaient eu l'idée *préconçue* d'accepter les plans d'Hopkins, l'intimée aurait encouru une responsabilité, non pas en vertu d'un contrat, mais à raison de sa mauvaise foi en trompant les compétiteurs, mais cette preuve n'est pas faite.

L'intimée s'est-elle obligée à soumettre les plans au Dr. Buck et aux autres experts? Il est vrai que par une résolution des gouverneurs il a été décidé que la chose serait faite. Mais cette résolution n'était que pour leur gouverne.

S'ils ne l'ont pas insérée dans l'avis, c'est qu'ils ne voulaient pas se lier.

Mais, reprend l'appelant, l'annonce dit de référer au président pour plus de renseignements, et le président a mentionné la résolution à l'appelant. Je ne crois pas que le président en mentionnant ce fait ait voulu lier la compagnie. Il l'a fait pour prouver la sincérité des directeurs.

D'ailleurs, aurait-il voulu lier la compagnie qu'il ne l'aurait pas pu.

La référence au président se rapportait aux détails de la construction et avait pour but de mieux faire connaitre ce que désirait avoir la compagnie, mais non pas de lier la compagnie à des conditions additionnelles.

L'appelant se plaint qu'après le délai expiré pour la production des plans, on a demandé à Hopkins de produire les siens. C'est vrai ; mais puisque l'intimée n'était

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tenue d'accepter aucun plan, rien ne l'empêchait d'en demander d'autres architectes.

Le choix me parait avoir été fait de bonne foi, du moins, il n'y a aucune preuve de favoritisme ; ce n'est même pas le bureau des gouverneurs qui a fait ce choix. C'est un comité spécial appelé Comité de Construction.

Ce n'est qu'après avoir laissé les différents plans exposés pour l'examen des souscripteurs et citoyens, et après avoir reçu les suggestions de chacun, que le choix a été fait.

L'appel est renvoyé.

Maclaren, Leet, Smith & Smith, for appellant.

Davidson & Ritchie, for respondent.

(J. K.)

November 27, 1891.

Coram LACOSTE, C.J., BOSSÉ, BLANCHET, WURTELE and TAIT, JJ.

ALEXANDRE BOURGEAU,

(*Defendant in Court below*),

APPELLANT;

AND

AZARIE BRODEUR,

(*Plaintiff in Court below*),

RESPONDENT.

Physician—Proof of services—C. C. 2260 ; 32 *Vic.* (*Q.*), *c.* 32, *s.* 1—*R. S. Q.* 5851.

HELD:—That the oath of the physician or surgeon, which, under R. S. Q. 5851, makes proof as to the nature and duration of the services, can only be rebutted by the clearest and most precise testimony, which was not found by the Court in the present case, in which by the evidence of doctors who had not seen the patient before or during the illness, and who did not speak positively, it was sought to reduce a physician's account, for treating a case of fracture of the collar bone, from $175 to $100.

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APPEAL from a judgment of the Superior Court, Montreal (JETTÉ, J.), May 14, 1890, in the following terms :—

"La Cour, etc.....

"Attendu que le demandeur se pourvoit en recouvrement d'une somme de $200, à laquelle il a réduit son compte de $251, pour consultations, soins et services rendus au défendeur, à l'occasion d'une fracture de la clavicule droite, et ce, pendant une période de trois mois et demi, du 20 octobre 1888, au 3 février 1889 ;

"Attendu que le défendeur conteste cette demande, disant : que la valeur des soins et services rendus n'est tout au plus que de $50 ; que d'ailleurs le traitement du demandeur a été inhabile et contraire aux règles de la science et a produit chez le défendeur des désordres graves qui enlèvent toute valeur aux services rendus, et ouvrent même un recours en dommages, mais que néanmoins, comme pour éviter le procès, il a offert une somme de $100, il renouvelle cette offre, avec consignation, et demande le renvoi de l'action pour le surplus ;

"Attendu que le défendeur a admis la réquisition des services du demandeur ; que ce dernier a établi la nature et la durée de ses services qui sont conformes aux entrées et charges énumérées à son compte, et qu'il a prouvé que ces charges sont raisonnables et ordinaires ;

"Vu l'article 2260 du Code Civil ;

"Attendu, en outre, que le défendeur n'a pas prouvé les allégations de son exception, et que la preuve générale qu'il a tentée pour établir que dans un cas ordinaire de fracture de la clavicule, sans aucune complication, une somme de $50 peut être une rémunération suffisante, parce que les soins du médecin ne sont alors requis que pendant quelques jours, ne saurait s'appliquer, dans l'espèce, vu la nature et la durée des soins donnés au défendeur ;

"Attendu, en conséquence, que la contestation du défendeur est mal fondée ;

"Attendu néanmoins que le demandeur a admis qu'avant l'action il avait consenti à réduire sa demande à $175 ; qu'il est établi que le défendeur, de son côté, avait

consenti à payer cette somme en disant au demandeur, sur l'offre de cette réduction, qu'il lui enverrait un chèque, ce qui impliquait nécessairement un chèque pour le montant ainsi fixé ;

" Considérant qu'il y a lieu, en tel cas, de maintenir, entre les parties, l'arrangement auquel elles s'étaient elles-mêmes arrêtées avant l'action ;

" Renvoie l'exception et défense du défendeur, déclare ses offres et consignation insuffisantes, et le condamne à payer au demandeur la dite somme de $175, avec intérêt du 27 septembre 1889, jour de l'assignation, et les dépens d'une action de cette classe, distraits, etc."

Nov. 20, 1891.]

C. A. Geoffrion, *Q.C.*, for appellant.

C. Lebœuf, for respondent.

Nov. 27, 1891.]

LACOSTE, C. J. :—

Action pour services professionnels d'un médecin. D'après compte produit, services $251, pour réduction d'une fracture de la clavicule de l'épaule droite. L'action a été prise pour $200. Jugement pour $175.

Plaidoyer: l'intimé n'a pas rendu des services pour le montant réclamé. Les services qu'il a rendus ne valaient pas plus de $100. Il ajoute que le traitement défectueux que l'intimé lui a fait subir, a eu pour résultat une parésie d'une partie de la main ; de là une diminution dans la valeur des services.

La question a été simplifiée par l'admission qui a été faite à l'argument par l'appelant, que la défense reposait actuellement, uniquement sur le fait que la maladie ne requérait pas tous les services mentionnés au compte, et que la somme de $100 offerte avant l'institution de l'action était suffisante.

L'appelant admet donc la requisition des services de l'intimé.

L'intimé a, sous l'autorité de l'art. 2260, C. C., prouvé, par son serment, la nature et la durée de ses services tels

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que portés à son compte, et il a fait entendre le Dr. Desrosiers qui a établi la valeur des services tels que décrits.

L'appelant a fait entendre quatre témoins, les Drs. Rottot, Guerin, Brosseau et Lamarche.

Trois de ces médecins, les Drs. Rottot, Guérin et Lamarche, admettent la valeur des services en eux-mêmes tels que portés au compte ; seul le Dr. Brosseau trouve le prix des visites trop élevé.

Tous quatre sont d'opinion que la réduction et le traitement d'une fracture de la clavicule ne valent pas plus de $100, montant offert par l'appelant.

Aucun de ces médecins n'a vu le patient durant sa maladie, mais ils ont formé leur opinion sur les dires de l'appelant, sur l'examen de sa personne et sur le témoignage du Dr. Brodeur.

Quelques jours après l'accident il est survenu une parésie ou paralysie partielle des doigts de la main droite. Le Dr. Brodeur l'attribue à la fracture et à ses conséquences, tandis que les médecins de la défense l'imputent à la compression trop forte du bras et à l'emploi d'un coussin que l'intimé a mis sous l'aisselle pour maintenir le bras dans la position voulue, afin de permettre à la clavicule de se consolider.

Ces médecins sont loin d'être positifs. Ainsi, sur la cause de la parésie, le Dr. Rottot dit, en réponse à la question : " La parésie peut-elle être assignée à une autre " cause que la compression ?" " Je ne voudrais pas dire " que c'est impossible ; mais je ne puis pas me l'expli- " quer."

Le Dr. Guérin dit : " Je ne dis pas positivement que " c'est là la cause, mais je dis que, selon mon opinion, " c'est là la cause."

Le Dr. Brosseau : " C'est dans l'ordre des choses possi- " bles... La probabilité est de un à mille."

Le Dr. Lamarche : " Rien ne me permet de l'attribuer " à d'autre cause. Cependant il faut bien se rappeler que " je n'ai pas constaté les dégâts au moment de l'accident."

Sur l'utilité des soins nous trouvons la même hésitation.

Le Dr. Rottot trouve difficile d'évaluer les soins. Il

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admet que, si les soins, donnés par le Dr. Brodeur pendant trois ou quatre mois, étaient absolument nécessaires, " alors le prix n'était pas trop élevé," admettant ainsi la possibilité de l'utilité de tous les soins portés au compte.

Le Dr. Guérin trouve *remarquable* que la maladie ait duré aussi longtemps et qu'elle ait été assez grave pour nécessiter des visites quotidiennes. Dans cette expression se trouve un doute.

Le Dr. Lamarche y voit un cas simple qui n'exigeait pas les services rendus. Cependant on lui demande: " Vous êtes bien positif à dire que, d'après le témoignage " du demandeur lui-même, il n'y avait pas de ces compli- " cations qui pouvaient en faire un cas grave et excep- " tionnel ? " Réponse.—" Quant à cela, je ne voudrais pas " être trop affirmatif. J'affirme que je ne vois rien ; main- " tenant que j'examine le malade qui est guéri, rien ne " me permet de croire qu'il y a eu autre chose qu'une " fracture simple." Question. " Et d'après le témoignage " du demandeur lui-même que vous avez entendu, n'au- " riez-vous pas la même opinion ? "—Réponse. " Oh oui, " je crois que oui, Ça me parait comme ça."

Il y a doute dans ce témoignage.

Sur l'emploi du coussin, les opinions des médecins de la défense sont partagées.

En supposant que la parésie soit dûe au traitement, deux des médecins de la défense sont d'opinion qu'il y aurait lieu à diminution dans les charges. L'un d'eux dit qu'on ne doit pas faire payer les soins résultant de ces complications. Le Dr. Guérin est d'opinion contraire.

Il résulte de l'ensemble de la preuve que, d'un côté, il y a l'affirmation du Dr. Brodeur, l'intimé, sur la nature de ses services rendus et sur leur durée, et que, d'un autre côté, on a l'opinion de quatre médecins qui n'ont pas vu le malade durant la maladie et qui déclarent ne pas pouvoir affirmer, mais qui sont d'opinion que la maladie n'a pas nécessité tous ces soins, et qu'elle a été aggravée et prolongée par le traitement du Dr. Brodeur, traitement que quelques-uns d'eux approuvent et que d'autres désapprouvent.

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A quelle conclusion devons-nous arriver?

La loi nous dit que nous devons croire le médecin qui a soigné. Son témoignage a une force probante et complète qui peut être assimilée à celle de la présomption *juris*, laquelle peut être combattue par une preuve contraire, mais ne peut être détruite que par une preuve forte et précise.

Nous ne trouvons pas ces caractères dans la preuve de la défense, et nous confirmons le jugement.

Judgment confirmed.

E. Bauset for the appellant.

C. Lebeuf for the respondent.

(J. K.)

November 27, 1891

Coram LACOSTE, Ch. J., BOSSÉ, BLANCHET, WURTELE and TAIT, JJ.

REGINA v. BOURDEAU.

Criminal Procedure—Reserved Case—Amendment—Notice to prisoner to produce document—Verbal evidence.

HELD:—1. That a Reserved Case will not be sent back to be amended by the judge who reserved it, upon the mere allegation of the prisoner or his counsel that the facts are not accurately stated therein.

2. That a prisoner is not entitled to complain of short notice to produce a document at his trial, where it is shown that the document in question was in the possession of a person under the control of the prisoner and his counsel on the day of the trial.

3. That the prisoner having in the circumstances declined to produce the document, secondary evidence was admissible.

HEARING on Case Reserved by CROSS, J., at the September Term of the Court of Queen's Bench, Crown side, held at Montreal.

The facts are stated in the opinion.

Nov. 21, 1891.]

St. Jean, for the Crown.

St. Pierre, Q.C., for the prisoner.

Nov. 27, 1891.]

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LACOSTE, Ch. J. :—

Bourdeau a subi son procès pour incendiat et il a été trouvé coupable. Dans le cours du procès la Couronne a prouvé, par témoins, différents contrats d'assurance avec des compagnies d'assurance.

La question repose sur l'admissibilité de la preuve orale.

Le Président de la Cour constate ce qui suit : Le procès a duré trois jours, du 15 au 18 septembre.

Le premier jour, l'avocat de la Couronne a présenté un avis, qu'il avait fait signifier au prisonnier de produire les copies d'assurances en sa possession ; et il a alors intimé à l'avocat du prisonnier de les produire ou de déclarer qu'il refusait de le faire, lui offrant du délai s'il le requérait. L'avocat, pour toute réponse, lui dit que la Couronne devait faire sa cause.

Au second jour, la Couronne tenta de faire la preuve par témoins des contrats d'assurance, mais l'avocat du prisonnier s'y objecta, alléguant l'insuffisance de l'avis vu que le délai était trop court, et que la copie laissée au prisonnier n'était pas certifiée. Cette objection fut prise en délibéré, et le matin suivant, la Cour déclara l'avis insuffisant. Toutefois, la Cour permit de prouver que, lors de la signification, le grand connétable qui signifiait, avait informé le prisonnier de la teneur de l'avis, et que le prisonnier ordonna à une certaine personne de les apporter en cour pour qu'elles fussent remises à son avocat, et que ces polices étaient, dès le premier jour du procès, en la possession d'une personne sous le contrôle du prisonnier, et par conséquent sous le contrôle du prisonnier et de son avocat.

Cette preuve faite, la Cour, permit la preuve orale des contrats d'assurance malgré l'objection de l'avocat du prisonnier.

A l'argument devant cette Cour, l'avocat du prisonnier s'est plaint que le rapport du juge ne contenait pas un

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exposé fidèle de la preuve, et demanda que le rapport fût renvoyé au juge pour qu'il l'amendât et que la preuve fût produite. Cette motion ne dit pas sur quel point l'appréciation de la preuve est fausse. L'article 264 de l'acte de la procédure criminelle permet bien à cette Cour de renvoyer au juge le rapport pour qu'il l'amende; mais la Cour doit présumer que le rapport du juge est exact, et à moins de circonstances exceptionnelles, elle ne doit pas renvoyer le rapport. *R.* v. *Halloway*, 1 Denison's Crown cases, p. 370.

La Cour ne doit pas renvoyer le rapport sur la simple demande de l'avocat; il faut qu'elle ait des motifs pour croire qu'il y a erreur dans le rapport du juge. Son devoir est d'apprécier la cause d'après la preuve telle que rapportée par le juge. *R.* v. *Brummitt*, Leigh & Cave's Crown cases, p. 9.

Nous refusons d'accorder la motion.

Sur le mérite: Il appert du rapport du juge que le matin du premier jour du procès, un avis a été signifié au prisonnier, et qu'à l'ouverture du procès, ce même jour, le prisonnier a été appelé à produire le document ou à déclarer qu'il s'y refusait. Le lendemain, lorsque la Couronne a tenté de faire la preuve par témoins, l'avocat du prisonnier s'y est opposé, alléguant l'insuffisance de l'avis. Son objection était appuyée: 1o. Sur le fait que la copie n'était pas signée, et 2o. sur ce que le délai accordé pour la production des polices était trop court.

Le juge n'a rendu sa décision que le lendemain, et il a déclaré l'avis insuffisant.

On doit inférer du rapport que sa décision a porté sur le "Short Notice." D'ailleurs rien n'oblige à signifier une copie certifiée de l'avis; la loi semble n'exiger "qu'un avis par écrit," et ce qui me permet d'inférer que la décision se rapportait au "short notice" c'est que le juge a permis la preuve pour appuyer l'avis et démontrer que le délai était suffisant. Cette preuve établit que le Grand Connétable a donné lecture ou fait connaitre la teneur de l'avis au prisonnier qui a ordonné à quelqu'un d'aller chercher ses polices d'assurance et de les apporter en cour

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à son avocat ; et il a été prouvé également, qu'au premier jour du procès, ses polices étaient en possession d'une personne sous le contrôle du prisonnier et de son avocat. Dans les circonstances, ne devons-nous pas dire que le prisonnier a été suffisamment notifié, que l'avis était tout à la fois suffisant avec la preuve supplémentaire, et que s'il n'a pas produit les polices c'est qu'il ne l'a pas voulu ? L'avis n'est requis que pour intimer au prisonnier de produire certains documents. Dans 7 Exchequer R. p. 646, *Dwyer & Collins*, il est dit que l'avis n'est requis que pour permettre à la partie de produire le document et la longueur du temps accordé dépend des circonstances, par exemple, de la distance que la partie a à parcourir, etc.

Dans les circonstances nous croyons que ce serait mal servir les fins de la justice, que de casser le verdict rendu dans cette cause, et que le prisonnier n'a à se plaindre d'aucune injustice, et qu'il devra subir sa condamnation.

BOSSÉ, J., concurred in the judgment, but not in all the reasons given by the Chief Justice. His Honor did not consider it indispensable that notice should be given in writing. It is usually given in writing because it is easier to prove it. When notice is given to the prisoner, and he does not produce the document, secondary evidence is admissible. The notice is to give the prisoner an opportunity to produce the document. If the evidence shows that he has it in his possession, it is not allowable for him to say that he will not produce it, and then object to the notice as insufficient.

Conviction affirmed.

St. Jean, for the Crown.

St. Pierre, Q.C., for the prisoner.

(J. K.)

November 27, 1891.

Coram LACOSTE, Ch. J., BABY, BOSSÉ, WURTELE, JJ.

ARCHIBALD McNAUGHTON,

(*Opposant, and creditor collocated, in Court below*),

APPELLANT;

AND

EXCHANGE NATIONAL BANK,

(*Plaintiff contesting opposition and collocation in Court below*),

RESPONDENT.

Unpaid Vendor—Privilege of—Opposition to sale of immovable seized—Art. 657, *C.C.P.—Shareholder—Company.*

HELD:—1. The privilege of *bailleur de fonds* does not give the unpaid vendor the right of opposing the seizure and sale of the immovable subject to it.

2. The unpaid vendor is not entitled to ask for the resiliation of the sale of an immovable unless there be a stipulation to that effect in the contract of sale.

3. A shareholder of a company is not entitled to exercise the rights of the company in his own name, and cannot oppose the sale of an immovable belonging to the company.

4. A promise of retrocession by the majority of the shareholders of a company is null, the company alone having the power to make such an agreement.

APPEAL from two judgments of the Superior Court, district of Ottawa (MALHIOT, J.), January 18, 1890. The first judgment was in the following terms:—

"Considérant que par son opposition afin d'annuler, produite en cette cause, le dit opposant prétend et allègue que la défenderesse (Ottawa Phosphate Mining Company) n'est pas propriétaire de ces lots ou parcelles de terre qui ont été saisis en cette cause et qui se trouveraient compris dans la moitié sud du lot de terre numéro 19 dans le douzième rang du township de Buckingham, et qui cons-

tituraient la dite moitié de lot, savoir des lots ou parcelles connus et désignés au plan et livre de renvoi officiels du cadastre pour le dit township de Buckingham, comme étant les numéros 19-1 jusqu'au numéro 19-112 du dit township, et cette partie des numéros 19-113 et 19-114 qui se trouverait comprise dans la dite moitié sud du dit lot, mais que les dits lots ou parcelles appartiendraient à une compagnie à fonds sociale appelée The Buckingham Mining Company, incorporée par lettres patentes de la Province de Québec, pour les avoir achetés de lui dit opposant comme ci-après ; que lui dit opposant se serait porté adjudicataire de la dite moitié sud du lot numéro 19 dans le douzième rang du township de Buckingham le 4 février 1861, pour la somme de $2.75, à une vente de terres pour taxes, qui aurait eu lieu ce jour là dans le comté d'Ottawa, et que plus tard, savoir le 14 mai 1868, il aurait obtenu son titre ou contrat de la corporation du dit comté, pour la dite moitié de lot ; que subséquemment savoir ; le 11 mai 1876, il aurait vendu le dit immeuble avec d'autres terrains miniers et droits de minier à la dite Buckingham Mining Company pour le prix de $50,000, dont $5,000 lui auraient été payées comptant et la balance stipulée payable comme suit, $5,000, aussitôt que certains procédés judiciaires alors pendants et qui affectaient le titre de la dite moitié sud du dit lot numéro 19 seraient définitivement renvoyés (final dismissal), $20,000 en parts ou actions acquittées (paid up shares) dans le fonds capital de la dite compagnie, et, la balance de $20,000 payable en argent plus tard (deferred cash) sur les profits éventuels de la dite compagnie, et par paiements annuels égaux au surplus des profits faits chaque année par la compagnie en sus de dix pour cent ; qu'il n'y aurait eu aucune possession contraire et que la dite compagnie aurait été mise en possession des dits terrains, et qu'elle en aurait pris possession dès avant la date du dit acte, et aurait miné le phosphate sur la dite moitié du lot numéro 19 pendant plusieurs mois, sans aucun trouble si ce n'est qu'à la date du dit acte il y aurait eu une action pendante, instituée par un certain Edmund William Murray du village de

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Buckingham, dans la Cour Supérieure, dans le district d'Ottawa, par laquelle il réclamait la propriété de la dite moitié de lot et se plaignait du trouble apporté à sa possession, mais que la dite action aurait été discontinuée avec dépens peu de temps après par le dit Edmund William Murray lui-même avant la preuve et l'audition finale au mérite; que le dit Edmund William Murray aurait, peu de temps après, institué une action au pétitoire contre la dite The Buckingham Mining Company, demandant à être déclaré propriétaire de la dite moitié sud du dit lot de terre numéro 19, et à en être remis en possession, laquelle compagnie aurait appelé le dit opposant en garantie en la dite cause, et que lui-même le dit opposant aurait appelé en garantie la corporation du comté d'Ottawa; mais que la dite action principale et les dites actions en garantie n'auraient jamais été poursuivies jusqu'à jugement final, et qu'elles seraient encore pendantes; que pendant que la dite compagnie exploitait le phosphate sur la dite moitié de lot, le dit Edmund William Murray aurait fait saisir in transitu le minéral ou phosphate extrait de la dite moitié de lot, et que les procès institués par le dit Murray auraient paralysé (hampered) les opérations de la dite compagnie, et que par suite elle serait devenue insolvable après plusieurs mois d'opérations, et que tout son actif tant mobilier qu'immobilier aurait été vendu par autorité de justice à l'exception de la dite moitié de lot, dont le dit Edmund William Murray se serait mis en possession par force et violence et dont il aurait empêché la saisie; que par suite de la discontinuation de la première action instituée par le dit Murray et à laquelle il est fait allusion dans le dit acte de vente, la dite somme de $5,000 serait devenue échue et exigible, parceque la dite discontinuation serait selon le dit opposant équivalente à un renvoi définitif des procédés tel que voulu par le dit acte, nonobstant que les dits procédés eussent été renouvellés immédiatement après; que de fait il aurait reçu des parts ou actions acquittées dans le fonds capital de la dite compagnie au montant de $20,000 en paiement de la somme de $20,000 stipulés payables en de telles parts; mais que le capital

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action aurait été augmenté (watered), et que par suite de l'insolvabilité de la dite compagnie les dites parts ne seraient d'aucune valeur ; que le dit opposant n'aurait rien reçu de la dite compagnie sur la somme de $20,000 stipulée payable sur le surplus des profits excédant dix pour cent chaque année, et que par suite de l'augmentation ou majoration du capital-action (watering of the stock) de la compagnie, la dite stipulation était devenue illusoire, et ce par le fait de la compagnie ; que de plus lui le dit opposant aurait un intérêt direct dans la dite moitié de lot comme l'un des principaux actionnaires de la dite compagnie ; que son intérêt dans le dit demi lot de terre ne serait pas seulement celui d'un créancier privilégié et hypothécaire, mais bien aussi celui d'un co-propriétaire, en sa qualité d'actionnaire, et que comme tel créancier privilégié et actionnaire il serait bien fondé à s'opposer en son propre et privé nom à la vente de la dite moitié sud du numéro 19 dans le douzième rang du township de Buckingham, et à demander la nullité de la saisie de la dite moitié de lot, comme faite *super non domino* ; pourquoi il conclut à ce que tous les procédés sur la dite saisie quant à la dite moitié de lot, soient suspendus et arrêtés, et à ce que la dite saisie, quant à la dite moitié de lot, soit déclarée avoir été faite *super non domino* et partant nulle et de nul effet, et à ce qu'elle soit mise de coté ; à ce que main levée en soit donnée ; que de plus il soit déclaré et adjugé que le dit opposant a un intérêt actuel de nature à lui donner droit de faire la dite opposition pour la conservation de ses droits ;

" Considérant que la dite demanderesse a contesté la dite opposition par une défense en droit par laquelle elle allègue l'insuffisance des allégations de la dite opposition, et par une défense en fait ;

" Considérant qu'il est établi, tant par la preuve orale que par les titres produits en cette cause, que lors de la saisie réelle pratiquée sur elle en cette cause, la défenderesse était en possession, publiquement, ouvertement et paisiblement et à titre de propriétaire, de l'immeuble saisie en cette cause, savoir du dit lot numéro 19 compre-

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nant toutes les subdivisions ou parcelles mentionnées dans la dite saisie depuis plus d'un an et un jour, savoir depuis le ou vers le 12 de janvier 1884; que la dite défenderesse était propriétaire du dit lot numéro 19, pour l'avoir acquis par acte de vente sous seing privé à elle consenti par Edward Winslow Paige de Schenectady dans l'état de New York, l'un des États Unis d'amérique, en date du 12 janvier 1884, et dument enregistré au bureau d'enregistrement du comté d'Ottawa le 2 avril suivant; que la moitié ouest du dit lot numéro 19 dans le douzième rang de Buckingham avait été octroyé par Sa Majesté la Reine par lettres patentes émanées sous le grand sceau de la Province du Canada à Québec, en date du 21 de juin 1852, à Edward Donnelly, et vendu par celui-ci à James Byrnes par acte *sous seing privé* en date du 6 avril 1856, et enregistré au bureau d'enregistrement du dit comté le 12 septembre suivant; que le dit James Byrnes a vendu la dite moitié ouest du dit lot à Edmund William Murray par acte sous seing privé signé et scellé devant témoin en date du 20 avril 1862, et enregistré au bureau d'enregistrement du dit comté le 20 août 1862; que par lettres patentes émanées sous le grand sceau de la ci-devant Province du Canada, en date à Québec du 27 de février 1864, Sa Majesté la Reine a accordé à John Merriman, pour bonne considération mentionnée dans les dites lettres patentes, la moitié nord du lot numéro 18 et la moitié est du dit lot numéro 19 dans le douzième rang du township de Buckingham; que par acte authentique passé devant Mtre. G. L. Dumouchel, notaire, à Aylmer en date du 26 juillet 1876, le dit John Merriman a reconnu et confessé que par un certain acte de vente passé à Hull devant Mtre. N. Tétreau, notaire, en date du 31 de juillet 1873, Charles Leduc, agissant pour le dit John Merriman et comme son procureur, avait vendu au dit Edmund William Murray la dite moitié nord du lot numéro 18 et la dite moitié est du lot numéro 19 dans le douzième rang de Buckingham, et par le dit acte le dit John Merriman a ratifié et confirmé la dite vente, laquelle vente avait été enregistré au bureau d'enregistrement du comté d'Ottawa le 16 août

1873; que par acte sous seing privé en date du 18 de janvier 1877 le dit Edmund William Murray a vendu un cinquième indivis dans la dite moitié nord du lot numéro 18 et dans la moitié est du lot numéro 19 dans le douzième rang du township de Buckingham, à James Francis McAndrew — lequel acte a été enregistré le 11 mars 1881; que par acte sous seing privé en date du 10 mars 1881 et enregistré au bureau d'enregistrement du dit comté le lendemain, le dit James Francis McAndrew a vendu un cinquième indivis de la dite moitié nord du dit lot numéro 18 et de la dite moitié est du dit lot numéro 19, à William Anderson Allan; que par son testament solennel reçu devant Mtre. J. B. A. Beaudin, notaire, et deux témoins au village de Buckingham le 29 mai 1883, le dit Edmund William Murray a légué tous ses biens meubles et immeubles à dame Ellen Merriman son épouse, à l'exception de trois dizièmes dans les mines appelées "The Emerald Phosphate Mines," sur le lot numéro 19 dans le douzième rang du dit township de Buckingham, de manière que la part du dit Allan dans les dites mines fut égale à celle de la dite épouse; que le dit Murray est décédé, et a été inhumé le premier juin 1883, et que le dit testament a été bien et dument enregistré au bureau d'enregistrement du comté d'Ottawa le 14 juin 1883; que par acte sous seing privé en date du 22 de septembre 1883, la dite Ellen Merriman a vendu au dit William Anderson Allan, entre autres immeubles et avec divers effets mobiliers tous ces lots ou parcelles de terre étant les subdivisions du dit lot numéro 19 et constituant tout ce dit lot numéro 19, connus et désignés au plan et livre de renvoi officiels pour le township de Buckingham comme les numéros 19-1 jusqu'au numéro 19-114 inclusivement, lequel acte a été enregistré le même jour; que par acte sous seing privé signé et scellé par les parties devant témoins à Ottawa le 9 novembre 1883 et enregistré le 13 du même mois, le dit William Anderson Allan a vendu au dit William Winslow Paige tous les dits terrains ou parcelles de terre constituant la totalité du dit lot numéro 19 dans le douzième rang du township de Buckingham, le-

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quel les a revendus à la défenderesse tel que ci-dessus allégué ;

" Considérant que la dite défenderesse, étant à la date de la saisie faite en cette cause en possession du dit immeuble à titre de propriétaire depuis plusieurs années, et notamment depuis plus d'un an et un jour avant la date de la dite saisie, en est présumée être la vraie propriétaire et ne peut en être dépossédé, que par autorité de justice à l'instance du véritable propriétaire ;

" Considérant que l'opposant comme créancier de la Buckingham Mining Company ne pouvait s'opposer à la vente de la moitié sud du dit immeuble, comme appartenant à la dite compagnie sa débitrice insolvable, que pour conserver la dite moitié du lot en la possession et parmi les biens de sa dite débitrice comme gage de sa créance, et à la condition d'établir que la dite moitié dû dit lot appartenait à sa débitrice, et de demander qu'elle fût déclarée lui appartenir, et que la défenderesse fût condamnée à lui en restituer la possession ;

" Considérant que le dit opposant ne demande pas par son opposition que la dite ' The Buckingham Mining Company ' soit déclarée propriétaire de l'immeuble en question, ni que la défenderesse soit condamnée à en restituer la possession à la dite The Buckingham Mining Company ou à ses créanciers ;

" Considérant que la demanderesse n'est pas obligée de suspendre l'exécution de son jugement contre la défenderesse sa débitrice en attendant l'issue des procès mentionnés dans la dite opposition, et dans lesquels la défenderesse n'est pas même partie ;

" Considérant que le dit opposant ne fait pas voir pour quelle somme déterminée il serait le créancier de la dite " The Buckingham Mining Company,' et qu'il n'allègue pas d'une manière claire et précise qu'il le soit aucunement ;

" Considérant que le privilége de bailleur de fonds ne donne pas au créancier le droit de revendiquer l'immeuble affecté à son privilége, ni même le droit de demander

la résolution de la vente, mais seulement d'être payé par préférence sur le prix de l'immeuble ;

" Considérant que le dit opposant n'allègue pas qu'à la date de la dite opposition il fut actionnaire dans la dite 'The Buckingham Mining Company,' et qu'il n'a aucunement prouvé qu'il l'ait jamais été ;

" Considérant en outre qu'il est établi par la preuve orale et par les lettres patentes et les autres titres produits et ci-dessus cités, que le lot numéro 19 dans le douzième rang du township de Buckingham était divisé dans le sens longitudinal de manière à former deux moitiés égales, dont une était la moitié ouest et l'autre la moitié est et non dans le sens transversale ; qu'il a été ainsi cédé dès l'origine par la couronne, qui en a octroyé la moitié ouest à Edward Donnelly le 21 de juin 1852, et la moitié est à John Merriman le 27 février 1864 ; qu'il est aussi désigné comme moitié ouest et moitié est dans les titres subséquents et comme appartenant à des propriétaires différents ; qu'il a été ainsi entré sur les rôles de perception de la corporation du township de Buckingham ; qu'il ne parait pas que le dit lot numéro 19 ait jamais été désigné dans aucun titre, ni sur aucun rôle d'évaluation comme étant divisé en moitié sud et nord, si ce n'est dans le titre qu'invoque l'opposant et que lui produit de la corporation du comté d'Ottawa ;

" Considérant que la désignation du terrain décrit dans le dit titre ou contrat de l'opposant n'est pas conforme à celle d'aucune partie du dit lot numéro 19, telle que portée aux rôles de perception de la corporation du dit township de Buckingham ;

" Considérant qu'il ne parait pas qu'il fut dû aucune taxe sur la moitié sud du dit lot numéro 19 quand elle a été annoncée en vente et adjugée à l'opposant, mais qu'au contraire il appert que la dite moitié sud n'était pas même mentionnée aux rôles d'évaluation et de perception de la dite municipalité du township de Buckingham ;

" Considérant que la corporation du comté d'Ottawa ne pouvait pas valablement vendre la moitié sud du lot numéro 19 dans le douzième rang du township de Bucking-

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ham pour des taxes imposées sur la moitié ouest ou sur la moitié est du dit lot, ou sur les deux moitiés ouest et est séparément ;

" Considérant qu'il n'appert pas que toutes les formalités requises pour arriver à la vente de la dite moitié sud du lot numéro 19 ait été remplies, ni comment le dit lot a pu légalement être vendu pour taxes, ni pour quelles taxes ;

" Considérant de plus, que le dit opposant ne parait pas avoir jamais pris possession d'aucune partie du dit lot numéro 19, et que la dite Buckingham Mining Company n'aurait été en possession du dit lot que pendant environ sept mois, vers l'année 1876 ;

" Considérant qu'après s'être porté adjudicataire du dit immeuble le 4 février 1861, le dit opposant a laissé écouler l'espace de sept ans savoir ; jusqu'au 14 de mai 1868 sans prendre son titre ou contrat de la corporation du comté d'Ottawa, et que pendant tout ce temps le dit opposant ne parait pas avoir pris possession du dit immeuble ni fait aucun acte de possession sur icelui ;

" Considérant que pendant le dit interval et longtemps avant même que le dit opposant eût obtenu son contrat de la corporation du comté d'Ottawa, savoir le 29 avril 1862, James Byrnes, le véritable propriétaire du dit lot, a vendu la moitié ouest du dit lot de terre numéro 19 au dit Edmund William Murray et lui en a passé titre, lequel titre fut bien et dument enregistré au bureau d'enregistrement du comté d'Ottawa le 20 août de la même année, une partie de laquelle dite moitié ouest savoir : la moitié sud, se trouverait comprise dans la partie du lot 19 qui aurait été adjugée au dit opposant et formerait la moitié ouest de la dite moitié sud du dit lot numéro 19 ;

" Considérant que les ventes de terre pour taxes municipales ne sont pas exemptes de l'opération des articles du code touchant l'enregistrement, et qu'elles sont sujettes aux mêmes principes que les autres ventes ;

" Considérant que le dit opposant et le dit Edmund William Murray doivent être considérés comme ayant acquis du même auteur, savoir de celui qui était pro-

priétaire de l'immeuble lors de l'adjudication à l'opposant, et que l'auteur de la défenderesse ayant enregistré son titre avant le dit opposant l'auteur de la Buckingham Mining Company, la défenderesse doit lui être préférée comme propriétaire de la dite moitié ouest de la moitié sud du lot numéro 19 ;

" Considérant que les lettres patentes accordées par la Couronne au dit John Merriman sont subséquentes à l'adjudication qui lui aurait été faite par le comté d'Ottawa, et que la dite adjudication et vente n'a pu préjudicier aux droits de la Couronne sur le dit lot de terre, et que partant la dite défenderesse, qui tient la dite moitié est du lot numéro 19 de John Merriman par une chaine non interrompue de titres tel que ci-dessus mentionné, doit être préféré comme propriétaire de la dite moitié est de la moitié sud du dit lot numéro 19 à la dite " The Buckingham Mining Company " qui la tient du dit opposant ;

" Considérant que pour toutes les raisons ci-dessus l'opposition afin d'annuler du dit opposant est mal fondée tant en droit qu'en fait, déboute le dit opposant de sa dite opposition afin d'annuler, avec dépens."

The second judgment appealed from, rendered June 23, 1890, was in the following terms :—

" La Cour après avoir entendu les parties par leurs avocats, sur le mérite de la contestation par la demanderesse, de la collocation du dit Archibald McNaughton, portée au projet de collocation produit en cette cause, examiné les pièces produites et la procédure et sur le tout murement délibéré ;

" Considérant qu'il appert par le jugement rendu en cette cause, le 18 janvier dernier, entre la dite demanderesse contestante et le dit Archibald McNaughton sur l'opposition afin d'annuler de ce dernier, et par les pièces produites par ce dernier au soutien de sa dite opposition, et par les pièces produites par la dite demanderesse au soutien de sa contestation de la dite opposition, et par la procédure et la preuve, sur lesquelles le dit jugement est basé, que le dit Archibald McNaughton n'avait aucun droit de propriété dans l'immeuble par lui vendu à la

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Buckingham Mining Company par acte de vente passé devant W. A. Phillips, notaire, en date du 11 mai 1876, et mentionné dans le certificat du registrateur du comté d'Ottawa produit en cette cause, et que la vente qu'il en a faite à la dite The Buckingham Mining Company n'avait aucune valeur à l'encontre de la demanderesse en cette cause ;

" Considérant que l'hypothèque créée par le dit acte de vente en faveur du dit Archibald McNaughton ne peut avoir aucune valeur et effet à l'encontre de la demanderesse en cette cause, et que c'est à tort que le dit McNaughton a été colloqué pour aucune partie de la dite hypothèque, et que la dite collocation est mal fondée, ordonne que la dite collocation soit rayée et mise de côté, et qu'un nouveau projet de collocation soit préparé, et que les deniers prélevés soient distribués conformément à la loi.

" Le tout avec dépens contre le dit Archibald McNaughton, dont distraction etc."

Sept. 23, 1891.]

M. McLeod, Q.C., for appellant.
T. P. Foran, for respondent.

Nov. 27, 1891.]

LACOSTE, C. J. :—

Appel d'un jugement renvoyant une opposition à une vente d'immeuble saisi sur la défenderesse The Ottawa Phosphate Company, et d'un jugement maintenant la collocation de l'appelant sur le produit de la vente de cet immeuble.

L'intimé a obtenu jugement contre l'Ottawa Phosphate Mining Company ; il a fait saisir, entre autres propriétés, le No. 19 du 12ème rang du township de Buckingham.

L'appelant s'est opposé à la vente de la moitié sud de ce lot, comme étant faite *super non domino ;* la propriété de ce terrain appartenant à la Buckingham Mining Company.

Art. 657, C. P., dit que les tiers sont recevables à faire cette opposition lorsqu'ils y ont un intérêt actuel.

Pour établir cet intérêt, l'appelant allègue qu'il a une réclamation de bailleur de fonds, ce qui lui donne le droit de reprendre la propriété ; et de plus, qu'il est actionnaire dans la Buckingham Mining Company, la véritable propriétaire à l'époque de la saisie. Et pour supporter ses prétentions il ajoute qu'une promesse de rétrocession lui a été consentie par la Buckingham Mining Company en satisfaction de sa créance.

Un privilége de bailleur de fonds ne donne pas au créancier qui le possède le droit de s'opposer à la vente de l'immeuble qui s'y trouve assujetti.

Ce privilége a deux effets, le premier d'être payé par préférence sur le prix, et le second droit de résolution de la vente.

La préférence sur le prix ne peut arrêter la vente, puisque cette vente doit avoir pour résultat de faire payer le bailleur de fonds.

Aux termes de l'article 1536, C.C., le vendeur ne peut demander la résolution de la vente qu'autant qu'il y a stipulation à cet effet dans le contrat de vente.

L'appelant a vendu à la Buckingham Mining Company par contrat du 11 mai 1876, et cet acte ne contient pas telle stipulation.

Son second moyen ne lui donne pas plus de droit ; un actionnaire ne peut faire valoir comme tel actionnaire et en son nom propre, les droits de la compagnie.

Une promesse de rétrocession de la majorité des autres actionnaires n'améliore pas sa position, car la compagnie seule aurait le droit de lui céder le terrain en question.

Nous pourrions nous dispenser d'adjuger sur le mérite proprement dit de l'opposition savoir : si la saisie a été faite *super non domino*. L'appelant énumère des titres pour établir que la défenderesse The Ottawa Phosphate Company n'était pas propriétaire mais que c'était sa compagnie.

Quelle que soit la valeur de ces titres, il est cependant de preuve que la Ottawa Phosphate Company était en possession lors de la saisie *animo domini* comme l'ayant acquise d'un nommé Paige en 1884. Son titre était contes-

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table et contesté, mais elle s'en croyait propriétaire et était réputée les posséder à titre de propriétaire, ce qui satisfait aux exigences de l'art. 632 C. P. lequel déclare légale la saisie sur le défendeur qui possède ou est réputée posséder *animo domino*.

Nous croyons donc bien fondé le jugement qui renvoie l'opposition.

Seulement, dans les considérants de son jugement, le juge va plus loin que ne l'autorise la contestation liée ; il adjuge sur la valeur respective des titres de la défenderesse et de la Buckingham Mining Company dont l'appelant est l'auteur.

Dans son opposition, l'appelant énonce ses titres qui sont ceux de la Buckingham Mining Company, l'intimée n'oppose à l'opposition qu'une réponse générale de la nature d'une défense au fond en fait. Ce n'est que plus tard, lors de l'instruction, qu'elle a produit les titres pour établir le droit de propriété de la défenderesse.

Il n'y a pas eu contestation liée sur le mérite respectif de ces titres et il n'y avait pas lieu d'adjuger.

Ces considérants devront être retranchés.

Le jugement sur l'opposition est confirmé, sauf la modification que je viens de mentionner.

Sur la contestation de la collocation :

Sur le produit de la vente du terrain dont il s'agit dans l'opposition, l'appelant a été colloqué pour la balance de son prix de vente à la Buckingham Mining Company ($1,699).

L'intimée conteste cette collocation en alléguant seulement qu'il a été déclaré, dans le jugement sur l'opposition, que l'appelant n'avait pas droit à ce montant, et que sur ce point il y avait chose jugée.

A cette époque le jugement n'avait pas la force de chose jugée, puisque l'appelant était encore dans les délais accordés pour un appel. De plus, le juge ne s'est prononcé qu'incidemment, non pas sur la réclamation de l'appelant, mais sur la validité des titres de la Buckingham Mining Company. Et, cette Cour venant de mettre de côté ses considérants, il ne reste aucune adjudication relativement

au titre de l'appelant. La contestation est mal fondée, et il n'y a pas lieu d'adjuger sur le mérite de la collocation.

Comme l'appelant réussit à faire casser un des jugements, et à faire modifier l'autre dont il devait appeler pour sauvegarder ses droits, nous lui accordons les frais sur l'appel.

The judgment is as follows :—

" The Court, etc.....

" With respect to the judgment rendered by the Superior Court for Lower Canada sitting at Aylmer in the district of Ottawa, on the 18th day of January, 1890, by which the opposition to annul made by the appellant against the seizure made by the respondents upon the defendant in this cause, the Ottawa Phosphate Mining Company, is dismissed with costs ;

" Seeing that the appellant sets up as his interest to make the said opposition, that he is an unpaid vendor of the immovable seized, with the right of obtaining a dissolution of the sale made by him, and that he is the principal stockholder in the capital stock of the company defendant, with the promise from the majority of the stockholders of a retrocession of the said immovable ;

" Seeing that the appellant does not allege that he has taken proceedings to obtain a dissolution of the sale made by him, and that he does not ask for a stay of execution to allow him to do so, and that in fact it appears by his deed of sale that he has no right to demand such dissolution ;

" Seeing that the appellant has not proved any agreement on the part of the majority of the shareholders to retrocede the said immovable to him, and that at all events only the company defendant could make a valid promise of retrocession ;

" Considering that the fact of the appellant being an unpaid vendor and being a stockholder in the capital stock of the company defendant does not confer upon him

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such an interest in the immovable seized as to authorize him to oppose the seizure and sale thereof;

" Considering that he has no capacity to make and maintain the said opposition to annul;

" Considering that the said opposition is unfounded and that the opposant is without any *locus standi*, and that it is therefore inopportune to consider the question of the company defendant's title;

" Considering that the seizure of the said immovables was made *super possidente animo domini*;

" Considering that the said opposition is consequently rightly dismissed, but for the reasons hereinabove given, and not for the reasons mentioned in the said judgment in relation to the question of title;

" Considering that there is no error in the decree of the said judgment, but that there is error in the motives or reasons given;

" Doth affirm for the reason above mentioned the decree of the said judgment, dismissing the said opposition to annul, with costs, with distraction in favor of Mtre. T. P. Foran, the attorney of the plaintiff contesting, but doth suppress the reasons set forth in the said judgment;

" And with respect to the judgment rendered by the Superior Court for Lower Canada sitting at Aylmer in the district of Ottawa, on the 23rd day of June, 1890, by which the contestation made by the appellant to the collocation made in the report of distribution in favor of the respondent is maintained, and the said collocation is rejected and set aside, with costs;

" Seeing that the respondent is collocated by the prothonotary for his apparent rights as vendor as mentioned in the registrar's certificate, and that the said judgment declares that it had been established by the judgment on the said opposition to annul rendered on the 18th day of January, 1890, that the appellant had had no right of property in the immovable sold by him to the Buckingham Mining Company by the deed mentioned in the registrar's certificate, and that the hypothec constituted by such deed was without effect against the respondent;

" Considering that the question of title has not been decided by the judgment as reformed dismissing the appellant's opposition to annul, and that its provisions can have no effect in the issue raised by the respondent's contestation of the appellant's collocation, and that there is therefore error in the said judgment of the 23rd day of June, 1890;

" Considering that the said contestation is unfounded, and should be dismissed, leaving the parties to exercise such rights as they may respectively have with respect to the said collocation and to the sum which is the subject thereof;

" Doth reverse and annul the said judgment maintaining the respondent's contestation and rejecting and setting aside the appellant's collocation, and proceeding to render the judgment which should have been rendered;

" Doth dismiss the said contestation, with costs, of which distraction is granted to Mtre. Malcolm MacLeod, the attorney of the collocated party;

" And doth condemn the respondent to pay the appellant's costs in appeal, of which distraction is granted, etc."

Judgment on collocation reversed.

Robertson, Fleet & Falconer, for appellant.

T. P. Foran, for respondent.

(J. K.)

November 26, 1891.

Coram LACOSTE, Ch. J., BABY, BOSSÉ and WURTELE, JJ.

ANGLO-CONTINENTAL GUANO WORKS
(*Defendant in Court below*),
APPELLANT;

AND

EMERALD PHOSPHATE Co.
(*Plaintiff in Court below*),
RESPONDENT.

Injunction—To prevent encroachment—Boundaries not determined—Bornage.

HELD:—That the remedy by writ of injunction does not lie where another adequate remedy exists; and so, in the case of a dispute between adjoining proprietors of mining lands, where an encroachment is complained of, and it appears that the limits of the respective properties have not been legally determined by a *bornage*, an injunction will not lie to prevent the alleged encroachment, the proper remedy being an action *en bornage*.

APPEAL from a judgment of the Superior Court, district of Ottawa, (MALHIOT, J.), June 3, 1891, in the following terms:—

"La cour, après avoir entendu les parties par leurs avocats, 1. sur le mérite de la requête de la défenderesse tendant à faire suspendre l'injonction contenue dans le bref d'injonction en cette cause, 2. sur le plaidoyer de la nature d'une exception à la forme plaidée par la défenderesse à l'encontre de la requête de la demanderesse pour obtenir la dite injonction et à l'encontre du dit bref d'injonction, 3. sur le mérite de la dite injonction et de la demande contenue dans cette dernière requête, et 4. sur le mérite de la motion de la demanderesse tendant à faire condamner la défenderesse à une amende de deux mille piastres pour mépris de Cour, pour par elle dite défenderesse n'avoir pas obéi à l'ordre ou injonction à elle donné en cette cause, examiné la procé-

dure et les pièces produites, entendu la preuve cour tenante, laquelle preuve a été faite en même temps, par l'ordre de cette Cour, sur toutes les contestations soulevées tant sur la dite requête pour injonction que sur tous les autres incidents ci-dessus enumérés, et sur le tout avoir délibéré ; faisant droit d'abord sur la dite motion ;

"Considérant qu'il est en preuve que la défenderesse a continué à extraire du phosphate de chaux ou apatite sur le terrain en litige entre les deux parties en cette cause, après la signification à elle faite du writ d'injonction émané en cette cause et malgré l'ordre au contraire contenu dans le dit writ, mais qu'il appert par la réponse faite par la dite demanderesse à la dite motion et par l'affidavit de William Burleigh Smith, le gérant de la défenderesse, que les dits travaux n'ont pas été faits au mépris de l'ordre de cette Cour, mais par mal entendu, et qu'aussitôt que le dit Smith eut connu la nature du dit ordre d'injonction la défenderesse s'y est immédiatement conformée, rejette la dite motion, mais avec dépens d'icelle contre la dite défenderesse ;

"Et faisant droit sur la dite exception à la forme ;

"Considérant qu'entre autres moyens invoqués par icelle, la défenderesse allègue que la demanderesse est une corporation étrangère et n'a pas son principal bureau d'affaire dans la ville de Buckingham, dans le comté d'Ottawa, mais dans l'état de New York, l'un des Etats-Unis d'Amérique, ce qui est établi par la preuve ;

"Considérant cependant que la demanderesse a par jugement interlocutoire en date du 18 mai courant, obtenu la permission d'amender le bref et les procédés en cette cause sur ce point, en par elle payant à la défenderesse les frais d'une exception à la forme, et que le dit bref et les dits procédés ont été amendés conformément au dit jugement ;

"Considérant que les autres moyens contenus dans le dit plaidoyer ou exception à la forme sont mal fondés, rejette le dit plaidoyer sans dépens ;

"Et faisant droit en même temps sur la requête de la

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demanderesse pour obtenir l'injonction en cette cause et sur la dite injonction contenue dans le dit writ, et sur la requête de la défenderesse demandant la suspension de la dite injonction ;

"Considérant qu'il est en preuve que la demanderesse et la défenderesse exploitent un certain dépot ou mine de phosphate de chaux ou apatite qui se trouve sur le lot numéro 19, et sur la moitié sud du lot numéro 18, dans le douzième rang du township de Buckingham dans le comté d'Ottawa, la demanderesse exploitant sur le numéro 19 et la défenderesse sur la moitié sud du numéro 18, et que la demanderesse prétend que son terrain s'étend jusqu'à une certaine ligne tirée par George C. Rainboth, arpenteur provincial le ou vers le 4 de novembre 1875, pour diviser les dits lots, tandis que la défenderesse ne reconnaît pas la dite ligne, et prétend que son terrain s'étend au-delà de la dite ligne vers l'ouest, et qu'elle a le droit d'exploiter le phosphate qui se trouve à l'ouest de la dite ligne jusqu'à une certaine distance de la dite ligne ;

"Considérant qu'il est admis que les auteurs de la dite demanderesse étaient propriétaires et en possession du dit lot numéro 19, dans le douzième rang du township de Buckingham dans le comté d'Ottawa, maintenant connu et désigné aux plan et livre de renvoi du cadastre d'enregistrement pour le dit township de Buckingham, sous le numéro 19 dès l'année 1874, et qu'il est également admis que la défenderesse par elle-même et ses auteurs étaient propriétaires en possession dès la même époque de la dite moitié sud du lot numéro 18 dans le douzième rang du township de Buckingham, maintenant connu et désigné aux plan et livre de renvoi du dit cadastre sous le numéro 18 *b* du dit township ;

"Considérant que les dits lots de terre sont contigus l'un de l'autre, et que dès le mois de novembre de l'année 1875, Edward William Murray, qui était alors en possession comme propriétaire de la moitié sud du dit lot numéro 19 dans le douzième rang du dit township de Buckingham, a fait tirer une ligne par George C. Rainboth,

arpenteur provincial, pour séparer le dit lot numéro 19 de la moitié sud du dit lot numéro 18, dans le même rang, que la dite ligne a été marquée par des poteaux sur le terrain défriché et par des plaques sur les arbres, sur le terrain boisé, que la dite ligne a été tirée en présence du propriétaire de la moitié sud du lot numéro 18 *b*, lequel n'a fait alors aucune objection à la dite ligne et a même aidé à la tirer ;

"Considérant que subséquemment, savoir la même année ou l'année suivante, le dit George C. Rainboth, à la demande et accompagné du même Edward William Murray, est descendu dans un puits (shaft) creusé sur le dit lot numéro 18 *b* et appelé le Grant Pit, pour constater si la compagnie dite The Buckingham Mining Company, qui était alors en possession des droits de mines sur le dit lot numéro 18 *b*, et qui les exploitait, n'empiétait pas sur la moitié sud du dit lot numéro 19 dont le dit Edward William Murray était en possession, et si elle ne dépassait pas, par des fouilles souterraines dans le dit Grant Pit, la dite ligne tirée par le dit George C. Rainboth en l'année 1875, et que le dit George C. Rainboth, après avoir fait les mesurages voulus, constata qu'elle avait dépassé la dite ligne d'environ six pouces, et que le dit Edward William Murray empêcha alors les employés de la dite "The Buckingham Mining Company" de travailler dans la direction de l'ouest, c'est-à-dire dans la direction du dit lot numéro 19, et que de fait la dite Buckingham Mining Company cessa de travailler dans la dite direction et dirigea ses travaux vers l'est, et qu'il ne paraît pas que la dite Buckingham Mining Company ait jamais empiété à l'ouest de la dite ligne après cela, en minant le phosphate dans le dit Grant Pit ;

"Considérant que quelque temps avant que le dit George C. Rainboth eût tiré la dite ligne et mesuré le dit puits, la dite "The Buckingham Mining Company" avait été en possession du dit lot numéro 19 et y avait extrait du phosphate, et qu'elle en avait été dépossédé par le dit Edward William Murray ;

"Considérant que cette possession très caractérisée du

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dit Edward William Murray doit profiter à ses successeurs et ayant cause, et qu'il est en preuve que la compagnie dite The Ottawa Phosphate Mining Company, et plus tard Stanislas Paschal Franchot, et plus tard encore la demanderesse, qui se sont succédés les uns aux autres à la suite du dit Edward William Murray dans la possession du dit lot numéro 19, ont toujours possédé jusqu'à la dite ligne tirée par George C. Rainboth en 1875;

"Considérant qu'un an ou deux après que le dit George C. Rainboth eût tiré la dite ligne, la dite The Buckingham Mining Company entra en liquidation et cessa d'exister, et que les mines sur le dit lot numéro 18 *b* cessèrent d'être exploitées, jusqu'à ce que la défenderesse ait commencé à les exploiter en mars ou avril, 1890, et que pendant tout ce temps, savoir: pendant environ douze ans, il ne paraît pas qu'aucun acte de possession utile ait été fait par les propriétaires du dit lot numéro 18 *b*, à l'ouest de la ligne tirée par le dit George C. Rainboth;

"Considérant que la ligne tirée par Edward J. Rainboth, en l'année 1887, à la demande de Alexander Fraser McIntyre, l'auteur de la défenderesse, ayant été tirée à l'insu des propriétaires du dit lot numéro 19 et sans leur participation, ne peut être considérée comme un acte de nature à interrompre la possession de la demanderesse et de ses auteurs; que d'ailleurs ces derniers sont restés jusqu'à l'institution de l'action en cette cause, en possession du dit lot numéro 19 jusqu'à la dite ligne tirée par George C. Rainboth en l'année 1875;

"Considérant que le 4 de juin de l'année 1890, par le ministère de Mtre. J. B. A. Beaudin, notaire, la défenderesse a notifié à la dite demanderesse qu'il n'y avait pas de ligne de bornage entre les dits lots de terre, et l'a requis de nommer un arpenteur pour procéder avec l'arpenteur nommé par la dite défenderesse, savoir: le dit Edward J. Rainboth, à tirer la ligne de division entre les dits lots de terre et au bornage des dits lots; que la dite défenderesse a nommé Richard W. Farley, arpenteur provincial, demeurant en la cité de Hull, pour procéder au dit bornage,

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mais que les dits arpenteurs n'ont pu s'accorder et que le dit bornage n'a pas eu lieu ;

" Considérant qu'il est en preuve qu'en mars dernier, avant l'émanation du bref d'injonction en cette cause, la défenderesse, en exploitant ses mines de phosphate sur la dite moitié sud du dit lot numéro 18, a dépassé d'environ six pieds, dans le dit puits appelé le Grant Pit, la dite ligne tirée par George C. Rainboth, en 1875, en gagnant l'ouest, et a empiété d'autant sur le terrain dont la dite demanderesse est en possession comme formant le dit lot numéro 19, maintenant connu comme les lots 19-1 jusqu'au lot numéro 19-114, et y a miné du phosphate et se l'est approprié ;

" Considérant que l'espace de terrain en litige entre les parties en cette cause et dont la demanderesse est en possession, se trouve à peu près au milieu du dépôt de phosphate qui se trouve sur les dits lots de terre, et que le phosphate qui s'y trouve en constitue toute la valeur ;

" Considérant que la dite demanderesse est bien fondée à demander à être maintenue en possession du dit lot numéro 19 jusqu'à la dite ligne tirée par George C. Rainboth, au moins tant et aussi longtemps qu'un bornage légal, soit à l'amiable entre les parties, soit sous l'autorité et par jugement de cette Cour n'aura pas été fait, et à demander qu'il soit enjoint à la défenderesse de cesser tous travaux à l'ouest de la dite ligne, et de cesser d'enlever le phosphate de chaux ou apatite qui se trouve à l'ouest de la dite ligne, que la requête de la demanderesse à cette fin est bien fondée, et que la requête de la défenderesse aux fins de faire suspendre l'injonction en cette cause est mal fondée, rejette cette dernière requête et déclare l'injonction contenue dans le bref émané en cette cause bonne et valable, ordonne et enjoint de nouveau à la dite défenderesse de s'abstenir de faire et faire faire aucuns travaux sur les lots numéro 19-1 jusqu'au lot numéro 19-114 inclusivement, dans le douzième rang du township de Buckingham, dans le comté d'Ottawa, tel que divisé du lot numéro 18 *b* par la ligne tirée par George C. Rainboth le ou vers le 4 novembre 1875, et de s'abste-

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nir d'enlever du phosphate de chaux ou apatite du dit terrain à l'ouest de la dite ligne, jusqu'à ce qu'un bornage légal, soit à l'amiable entre les parties, soit en vertu d'un jugement de cette Cour, n'ait été fait pour séparer le dit lot numéro 19, maintenant les lots numéros 19-1 jusqu'au numéro 19-114 du township de Buckingham, du lot numéro 18 *b* du dit township, ou jusqu'à ce qu'il en soit ordonné autrement par cette Cour, sous toutes peines et penalités que de droit, et condamne la défenderesse aux dépens des présentes."

Sept. 24, 1891.]

R. Laflamme, Q. C., and *A. G. Cross* for appellant:—

The judgment in effect recognizes that no boundary has been legally established, and respondent specifically admits this in the following allegation of its answer to defendant's second plea, "That the defendant knew of the "plaintiff's possession up to the line of George C. Rain- "both *and of the property West thereof being disputed pro-* "*perty.*"

If we take the facts as the judgment recites them, it necessarily follows that by the judgment appellant is prohibited from going beyond a line which is admitted not to be a legally established boundary line, and is prohibited from touching property which admittedly may be its own property, while on the other hand the respondent is left free to do what it likes with the same property which may not belong to it at all. This anomalous result could never have been reached had plaintiff adopted the proper remedy of a boundary suit.

Under these circumstances the appellant contends that a boundary suit might have been instituted, but that there is no case for an injunction. As stated in the work of High: "The writ of injunction being largely a pre- "ventive remedy will not ordinarily be granted, when "the parties are in dispute concerning their legal rights, "until the right is established at law." High on Injunctions, Vol. I., p. 7, sec. 8.

So, also, in "Kerr on Injunctions," at page 294, we find

it stated that, "The jurisdiction of a Court of Equity in "cases of trespass is in aid of the legal right. The Court "interferes on the assumption that the party who makes "the application has the right which he asserts, but needs "the interference of the Court for the protection of the "property from irreparable damage pending the trial of "the right. If the right at law is clear and serious damage "is likely to arise to the plaintiff, if the defendant is "allowed to proceed with what he is doing or threatens "to do, or has given notice of doing, an injunction will "be granted pending the trial of the right."

White v. *Whitehead*, 7 Leg. News, p. 292.

DeLaney v. *Guilbault*, 19 R. L., p. 544.

These authorities refer to cases where a suit is pending to "try the right," and in those cases where injunctions are issued they are only issued in view of a suit being actually in progress to try the legal right, "and where," as the writers say, "the right at law is clear." But in the present case the respondent does not even take the trouble to move in the direction of trying its right, but will be quite satisfied to go on and take the minerals from the disputed ground, and is put under no obligation to establish the ownership, which, as stated, is confessedly in dispute.

The conditional or limitative form in which the judgment under review has pronounced the injunction is illegal, inasmuch as a final injunction is intended to be perpetual, and should not be pronounced until the Court has been put in a position to adjudicate upon the right in dispute. High, Vol. I, sec. 3, p. 4. In the present case however, a perpetual or final injunction is pronounced even with an admission that there is a right in dispute, but without any suit being pending or to be taken to try the right. The appellant is surely well founded in contending that its neighbour is as much bound to settle the boundary as it is itself, and that a judgment and especially an injunction which in advance maintains the pretensions of one neighbour about a boundary until the

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other neighbour shall have taken suit and got judgment, is both illegal and unjust.

"So where the right to the premises is in doubt pend-"ing an action of ejectment at law, the relief will not be "granted on the general principle that where the right is "doubtful equity will not interfere. And an injunction "granted to stay waste pending an action of ejectment at "law will be dissolved on denial of complainant's title, "especially if he is negligent in trying the title at law. "The jurisdiction of equity in cases of waste is not in "derogation of the jurisdiction of courts of law but rather "in aid of the legal right. Hence arises the limitation "that it will be exercised only when complainant has "established or is endeavoring to establish his title at "law." High, Injunctions, 2nd Ed., Vol. I, p. 426.

If the respondent had taken a boundary suit and made application pending the suit for a suspensory order, it would have been in a very different position. Each party would be at the same time, plaintiff as well as defendant, and both might have been ordered not to meddle with the object in dispute until final adjudication as to the boundary had been pronounced.

The appellant therefore submits that there was no case for the extraordinary remedy of an injunction; but with the judgment as it now stands, it has of course become the interest of the respondent not to establish its title to the land in dispute. Fortified by a peremptory injunction in the enjoyment of a piece of land, respondent will not be so foolish as to start a boundary suit which might result in giving that piece of land to appellant.

But even leaving out of account for a moment the objections to the special character of the remedy by injunction, the respondent's action is still clearly unfounded for the reason that it is an action of trespass (*en complainte*), whilst the respondent ought first to have had recourse to a boundary suit. This rule applies the moment that it appears that the alleged line of George C. Rainboth mentioned in the writ was not a legally established boundary line. The boundary was undetermined and

an action *en complainte* would not lie until proper *bornage* had been made.

There can be no question that the respondent's *demande* is in effect nothing more or less than an action of trespass or *trouble*, though put under cover of a so-called writ of injunction. The complaint is in effect that the defendant has trespassed upon plaintiff's land by crossing a specified line which respondent chooses to call the boundary line, and by removing phosphate of lime.

By so instituting its action respondent put itself under the necessity of proving that the boundary had been established as it alleged it to be, but this it wholly failed to do, as appears by the judgment. The authorities in support of this proposition are sufficient to put it beyond question.

Robertson v. *Stuart*, 13 L. C. R. p. 462.

Harbour Commissioners v. *Hall*, 5 L. C. J. p. 155.

Fraser v. *Gagnon*, 4 Q. L. R. p. 381.

Lacroix v. *Ross*, 11 Q. L. R. p. 78.

Milliken v. *Bourget*, M. L. R., 5 Q. B. p. 300.

This proposition being established the rule sought *à fortiori* to be applied in a case like the present where the plaintiff has not only taken the action *en complainte*, but has sought to accompany it with the rigorous recourse of a writ of injunction.

The action of the respondent being therefore a simple demand *en complainte*, appellant's plea alleging short service and contesting the form of recourse by injunction should have been maintained.

Black v. *Stoddart*, 4 Leg. News, p. 282.

The appellant contends that there is error in the judgment inscribed against :—

(*a*) Because the case disclosed by the petition and affidavit was not one which justified the short delays and summary remedy of a writ of injunction, and did not allege exposure to irreparable damage or show that there was no other legal recourse open to the respondent;

(*b*) Because no injunction should have been maintained leaving the property admittedly in dispute;

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(*c*) Because respondent neglects to have the boundary established ;

(*d*) Because the respondent as plaintiff did not make out a clear case free from difficulty or doubt;

(*e*) Because the respondent's *demande* merely amounts to an action of trespass or disturbance, and such an action (and *à fortiori* an injunction) could not legally be taken before the boundaries had been established ;

(*f*) Because the possession by the owners of lot 19 was not sufficient to show a title to the property in dispute, or to establish a boundary, or to dispense with the necessity of a bornage, and in any event was not exclusive in its character, and is not pleaded by the respondent;

(*g*) Because there is no proof that appellant ever went beyond even the George C. Rainboth line in its operations.

T. P. Foran, for respondent, referred to the following among other authorities :—

Pigeau, (2nd edition, p. 481) :

" En général les tribunaux ne font pas assez d'usage du pouvoir qu'ils ont d'obvier par des jugements provisoires, aux maux qu'entrainent nécessairement la lenteur de l'instruction, la chicane des plaideurs et le retard des juges. Beaucoup de gens n'entament et ne soutiennent une contestation que parcequ'ils savent que la justice est toujours lente à punir. Le tort que souffre la partie injustement opprimée est souvent considérable ; cependant, nombre de juges, par une fausse pitié, dans la crainte de plonger l'autre et sa famille dans la misère, n'accordent pas à l'opprimé une réparation proportionnée ; ils auraient évité cette injustice, s'ils eussent, dès l'entrée de la cause, accordé la provision à qui elle était due."

High on *Injunctions*, No. 329 :

" While, as a general rule, Courts of equity look unfavorably upon applications for injunctions pending proceedings at law to determine the title to realty, there may be peculiar circumstances connected with the property rendering it imperative that the rule should be somewhat relaxed and the relief granted. Thus, where the title to

mining property is in controversy, an injunction may be granted to preserve the property pending litigation to try the right, the exception resting upon the peculiar nature of the property in dispute."

High, No. 730:

"In the case of trespass to mining property greater latitude is allowed to Courts of equity than in restraining ordinary trespasses in realty, since the injury goes to the immediate destruction of the minerals which constitute the chief value of this species of property."

High, No. 371:

"While the general rule requiring complainant to show a good title extends to trespass against mines, yet it may be relaxed somewhat in a case of irreparable mischief, where the injury goes to the destruction of the very substance of the estate."

High, No. 732:

"It is necessary, however, that the owner should have actually established his title by an action at law, and if he makes out a good *prima facie* title which is not controverted by defendant, and shows that those under whom he claims have been in possession and use of the mine for a long period of years, he is entitled to an injunction to prevent such depredations upon his mine as are likely to result in irreparable injury."

High, No. 735:

"It is thus apparent that Courts of equity are inclined to a somewhat liberal use of the remedy by injunction to prevent trespasses to mines, the relief being granted for the prevention of irreparable injury resulting as well from the character of the property as from the nature of the trespass. And the relief is regarded as peculiarly applicable to the case of a placer mine, the value of which consists in auriferous deposits, which may be worked out and removed without leaving any evidence of their value upon which to base an accounting."

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LACOSTE, Ch. J. :—

Appel d'un jugement accordant une injonction.

L'intimé, demanderesse en Cour Supérieure, exploite une mine sur le numéro 19 du douzième rang du township de Buckingham. L'appelante, défenderesse en Cour Supérieure, exploite sur la partie sud du numéro 18.

L'intimée a demandé une injonction contre l'appelante pour l'empêcher d'empiéter sur le numéro 19 dans ses opérations minières, et elle a appuyé cette demande sur une possession datant de 1875 allant jusqu'à une certaine ligne tirée cette année par le nommé G. C. Rainboth, arpenteur.

La demande a été accordée sans avis préalable donné à la partie adverse.

Pendant l'instance, l'appelante a demandé la suspension de l'ordre d'injonction, ce qui lui a été refusé, mais comme le jugement a été rendu au mérite, il n'y a pas lieu de s'occuper de ce jugement interlocutoire.

L'appelante a plaidé à la forme, que la demanderesse est désignée dans le bref comme ayant sa place d'affaires à Buckingham, tandis qu'elle l'a dans l'état de New York, que la nature de la demande ne justifie pas l'adoption de procédures sommaires applicables au bref d'injonction, et que le délai d'assignation est en conséquence trop court ; que le jour du rapport du bref n'a pas été fixé par le juge ; enfin, que l'affidavit et la requête sont vagues et ne démontrent pas un droit à l'*injonction*, et n'établissent pas que l'intimé devra souffrir un dommage sérieux et irréparable si le bref est refusé.

Au mérite l'appelante nie tout empiètement, et plaide que le remède applicable est la demande en bornage pour établir au préalable la véritable ligne de division.

Sur les questions de forme nous croyons qu'il y a bien jugé.

Sur le mérite : Il résulte des plaidoiries que les empiètements dont l'intimée se plaint auraient eu lieu sur la partie de son terrain, limitrophe de celui de l'appelante.

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La question d'empiètement ne saurait être décidée avant que la véritable ligne de division ait été déterminée. Or le mode pour déterminer cette ligne est le bornage.

Nos cours ont, à maintes reprises, refusé d'adjuger sur les droits des parties, avant qu'un bornage n'ait eu lieu.

Ainsi il a été décidé qu'une action pétitoire ne pouvait pas être portée pour empiètement sur une propriété sans qu'au préalable un bornage régulier n'ait été fait.

Ce principe a été consacré par cette cour dans *Fraser & Gagnon*, 4 Q. L. R. p. 381. Dans cette cause, le défendeur ne niait même pas l'empiètement ; il s'est contenté de dire, que le demandeur aurait dû prendre l'action en bornage.

Dans *Milliken & Bourget*, M. L. R., 5 Q. B. p. 300, c'était une action pour le recouvrement de la valeur d'arbres coupés sur le terrain du demandeur près de la limite de son terrain. Bien que la preuve fut en faveur du demandeur, l'action fut rejetée, cette cour étant d'opinion qu'il fallait un bornage.

Dans la présente cause, il y a eu plusieurs lignes de tirées, *ex parte*, mais n'ayant aucun caractère légal.

Dès avant 1875 le nommé Newman a planté un piquet, parait-il, dans la ligne de division, lorsqu'il a arpenté le township.

En 1875, l'auteur de l'intimée a fait tirer une ligne par G. C. Rainboth, arpenteur.

En 1888, l'appelante en a fait tirer une autre par Edward J. Rainboth, arpenteur aussi. Ces deux lignes diffèrent. Subséquemment, l'appelante a demandé un bornage. Chacune des parties a nommé son arpenteur. Les deux arpenteurs ne s'étant pas accordés ont fait des rapports séparés, et l'intimée dans les circonstances s'est crue justifiable de demander l'injonction.

L'injonction a pour but de protéger un droit clairement établi, et ne doit pas être accordée quand le droit est discutable, surtout quand, comme dans l'espèce, le devoir de la partie est de prendre une action en bornage.

Le remède de l'injonction est rigoureux et ne doit être appliqué que quand il n'y en a pas d'autre.

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Sur action en bornage les parties pourront obtenir un ordre beaucoup plus équitable qui sauvegardera leurs droits.

The judgment is recorded as follows :—

" La Cour, etc.....

" Considérant qu'il n'y a pas lieu d'adjuger sur la requête de l'appelante tendant à faire suspendre l'injonction, vu qu'il y a eu adjudication, en même temps, sur le mérite du bref ;

" Considérant qu'il y a bien jugé sur le plaidoyer de la nature d'une exception à la forme, fait par l'appelante, défenderesse en Cour de première instance, et sur la motion de l'intimée, demanderesse en Cour de première instance, tendant à faire condamner l'appelante à une amende de $2,000 ;

" Confirme le jugement dont est appel, savoir, le jugement rendu par la Cour Supérieure siégeant à Aylmer le 3e jour de juin 1891, en autant qu'il rejette la dite motion de l'intimée tendant à faire condamner l'appelante à une amende, et le plaidoyer de la nature d'une exception à la forme, fait par l'appelante ;

" Et adjugeant sur la requête de la dite intimée pour obtenir l'injonction, et sur la dite injonction ;

" Considérant qu'il est établi que les opérations minières de l'appelante, que l'intimé veut empêcher par une injonction, étaient faites sur les limites des propriétés respectives des parties ;

" Considérant qu'il n'y a pas eu de bornage pour déterminer la ligne de division entre ces propriétés ;

" Considérant que dans ces circonstances il n'y avait pas lieu d'accorder une injonction, et, partant, que dans le jugement dont est appel il y a mal jugé sur le mérite de la demande d'injonction, maintient le présent appel avec dépens quant à cette partie du dit jugement qui déclare l'injonction bonne et valable ; en conséquence casse

le dit bref d'injonction et renvoie la demande d'injonction avec dépens."

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Judgment reversed

Laflamme, Madore, Cross & Larochelle for appellant.

T. P. Foran for respondent.

(J. K.)

March 18, 1891.

Coram DORION, Ch. J., CROSS, BABY, BOSSÉ, DOHERTY, JJ.

REGINA v. LABRIE.

Criminal law—53 Vict. (D.) ch. 37, s. 11—Conjugal union—Cohabitation.

HELD:—The mere fact of cohabitation between two persons, each of whom is married to another person, will not sustain a conviction under R. S. C., ch. 161, as amended by 53 Vict. (D.), ch. 37, s. 11.

HEARING on the following case reserved by BABY, J., at the March term of the Court of Queen's Bench sitting on the Crown side at Montreal:—

During this term, one Labrie appeared before the Court and stood his trial for "on the 1st of September, 1890, "and for a long space of time from and after that date, at "Montreal, did unlawfully live and cohabit in conjugal "union with a certain person, to wit, Rose Ada Martin, "she the said Rose Ada Martin being then married to "another person, to wit, Joseph Benjamin Morin."

The facts of cohabitation and that each of them were married to other parties were fully proved. However, counsel for the defence claimed that there was no offence for which Labrie could in law be convicted; that the paragraph *d* of sect. 5 (an additional clause to chap. 161 of the R. S. C., as amended by sect. 11 of 53 Vict., ch. 37, 1890), only applied to Mormons and the like who have gone through a marriage of some sort — a "conjugal union"—before cohabiting with one another. On the other hand the Crown held that the law applied to every

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and anybody who, then married, cohabited, or agreed or consented to do so, with another married person, as Labrie had done.

In my charge to the jury, I told them that the point raised was quite a new one, the law having come into force last year only, and suffered some considerable doubt from the wording of the statute, and what had been the intention of the legislature in framing it, and that if they brought in a verdict of guilty, I would most certainly reserve the point for the consideration of the full Bench of the Court of Queen's Bench.

They brought in a verdict of guilty, but I did not sentence the man.

The point now reserved is whether or not, under the new statute above referred to, Labrie committed the misdemeanour he has been found guilty of.

G. BABY, J.

Montreal, 16th March, 1891.

The amending statute, 53 Vict., ch. 37, s. 11, referred to above, reads as follows:—

"11. The following sections are hereby added to the last cited Act (R. S. C., c. 161):—

'5. Every one who practises, or, by the rites, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether in a manner recognized by law as a binding form of marriage or not, agrees or consents to practise or enter into—

'(*a*) Any form of polygamy; or

'(*b*) Any kind of conjugal union with more than one person at the same time; or

'(*c*) What among the persons commonly called Mormons is known as spiritual or plural marriage; or

'(*d*) Who lives, cohabits, or agrees or consents to live or cohabit, in any kind of conjugal union with a person who is married to another or others in any kind of conjugal union, etc.... is guilty of a misdemeanour, etc."

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St-Pierre, Q.C., for the defendant, contended that the object of the statute was to repress mormonism. There must be a conjugal union—some form of ceremony joining the parties. The object of the law was not to prevent immorality. It was taken from the Edmunds Act in the United States. It is not intended to prevent mere concubinage, but a union of persons of opposite sex which the parties suppose to be binding on them. The words "conjugal union" imply that there must be some tie between the parties.

Cloran for the Crown.

DORION, Ch. J., giving the judgment of the Court, held that there was no offence shown. It was apparent from the statute that there must be some form of contract between the parties, which they might suppose to be binding on them, but which the law was intended to prohibit.

The judgment reads as follows :—

"After hearing counsel for the Crown and on behalf of the prisoner, and due deliberation had on the case transmitted to this Court from the Court of Queen's Bench sitting on the Crown side at Montreal, it is considered and adjudged and finally determined by the Court now here, pursuant to the statute in that behalf, that the evidence adduced did not justify a verdict of unlawfully living and cohabiting in conjugal union with a person already married to another person, and that the said prisoner ought not to have been convicted, and his conviction is therefore quashed and set aside."

Conviction quashed.

Cloran, for the Crown.

St-Pierre, Q.C., for the prisoner.

(J.K.)

June 25, 1891.

Coram BABY, BOSSÉ, DOHERTY and CIMON, JJ.

COMPAGNIE DE CHEMIN DE FER À PASSAGERS DE MONTRÉAL

(*Defendant in Court below*),

APPELLANT ;

AND

AUGUSTE DUFRESNE

(*Plaintiff in Court below*),

RESPONDENT.

Negligence—Child killed on street railway.

HELD : Reversing the judgment of LORANGER, J., M. L. R., 7 S. C. 10, Where a child, two years of age, through the negligence or want of vigilance of its parents, is allowed to leave its residence and get on the track of a street railway, and is killed there by a car of the railway company, without any fault on the part of the employees of the company, an action of damages by the father of the child will not be maintained.

APPEAL from a judgment of the Superior Court, Montreal (LORANGER, J.), Dec. 29, 1889, condemning the appellant to pay $500 damages. The judgment of the Court below is fully reported in M. L. R., 7 S. C. 10–16.

May 22, 23, 1891.]

H. Abbott, Q. C., and *Meredith*, for appellant :—

This is an appeal from a judgment rendered by Mr. Justice Loranger, on the 26th December, 1889, maintaining the plaintiff's action to the extent of $500.

The plaintiff in his action claimed $5,000 from the company defendant, as damages suffered by him in consequence of the death of his minor son, not two years old, caused, as he alleged, by the negligence of the defendant and its employees.

The defendant demurred to this action on the ground that the claim as set forth in the plaintiff's declaration

was not in any part recoverable in law, and pleaded to the merits :

(1) A general denial ;

(2) (And without waiver of the first plea) That the accident was not in any way caused by the negligence or fault of the company, or of those for whom the company is or was responsible, but on the contrary, that the accident was wholly caused by the fault and negligence of the plaintiff, or of those for whom he was responsible, in allowing the child in question, who was less than two years old, to cross the public street without any one to take charge of him, at a time when the ordinary street traffic was going on, and particularly when the cars of the company would be likely to pass, and that the plaintiff was alone responsible for any injury that may have been caused to the child.

That the employees of the company defendant at the time of the accident were exercising due care and diligence in seeing that the street was clear.

That the accident was unavoidable, and one which the employees of the company could not have prevented.

The plaintiff answered the demurrer by alleging :

1. That his action was well-founded, both in law and in fact, and that the allegations of his declaration were sufficient to warrant his conclusions.

2. That his declaration showed a good cause of action for the $5,000 claimed.

There are only two questions, as far as the facts are concerned in this case.

1. Are the defendants responsible for the death of the respondent's two-year-old child ;

2. If appellants are responsible, what is the amount of compensation the respondent is legally entitled to recover from them.

The following is the case in a few words :

The plaintiff lived, with his wife and three children, in an upper tenement house in St. Catherine Street, one of the thoroughfares of Montreal, over which the appellants

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had a line of railway. The plaintiff, at the time of the accident, was a letter carrier in the employ of the Post Office Department, and absent from home except at meal time, and his wife (*enceinte* at the time) attended to all the household affairs and in addition furnished board to two persons, the lessee of the lower tenement and one of his clerks. The child whose death is the subject of the present action, had on two or three occasions, walked from the upper tenement to the lower one, and might, had it not been noticed by persons in the shop below, have wandered on St. Catherine Street, and been run over as it eventually was at a later date. It would appear from this that the child was not properly looked after, and it is submitted that the plaintiff ought to have taken measures to insure its safety, and profited by the warning he had already received.

The plaintiff has endeavored to establish that the sight of the driver Lacroix was defective, but he has failed to show that he had such a defect in his vision as would interfere with his safely driving a street car, and the joint report of Drs. Foucher and Buller establishes that his vision was amply sufficient for all the ordinary affairs of life, and certainly was sufficient to enable him to see large objects distinctly at a distance of several hundred feet. Dr. Buller, both in his examination in chief and in his cross examination, positively states that in his opinion he considers Lacroix a safe driver for a railway car.

J. L. Archambault, Q.C., for respondent, contended that the accident occurred in consequence of the defective sight of the driver, and that the judgment was well founded.

BABY, J., was of opinion that the appeal should be maintained, and referred to *Dominion Oil Cloth Co. & Coallier*, M. L. R., 6 Q. B. 268, in which this Court reversed the judgment of the Court below.

DOHERTY, J., dissented on the ground that there had been negligence on the part of the company's employees.

The judgment is as follows :—

" La Cour, etc.....

" Considérant que l'intimé, demandeur en première instance, n'a pas prouvé que la mort de son enfant a été causée par la faute ou négligence de l'appelante ou de ses employés ;

" Considérant au contraire, que l'appelante a prouvé que l'accident est dû au fait que l'enfant de l'intimé, échappant à la surveillance de sa mère, est descendu dans la rue, et s'est jeté, inconscient du danger, sur la voie ferrée de l'appelante au moment où un des chars de cette dernière y passait, et a été écrasé ;

" Considérant qu'il résulte des faits de la cause, tels qu'ils ont été établis en preuve, que s'il y a eu faute ou négligence quelque part, c'est du côté des parents qui, en se relâchant pour un instant de leur surveillance, ont permis à un enfant de deux ans de s'échapper de leur domicile, de descendre dans la rue, traverser la voie ferrée seul et sans protection, et non du côté de la compagnie, et partant que dans le jugement dont est appel, savoir, le jugement rendu par la Cour Supérieure à Montréal le 26e jour de décembre 1889, il y a erreur, casse et renverse le dit jugement ; et procédant à rendre le jugement que la dite Cour de première instance aurait dû rendre, déboute le demandeur intimé de son action ; chaque partie payant ses frais tant en Cour de première instance qu'en appel. (*Dissentiente* l'hon. juge Doherty)."

Judgment reversed, Doherty, J., *diss.*

Abbotts, Campbell & Meredith for appellant.

Archambault, Bergeron & Mignault for respondent.

(J. K.)

November 27, 1891.

Coram LACOSTE, Ch. J., BOSSÉ, BLANCHET, WURTELE, TAIT, JJ.

DAME MARY O'CONNOR ET VIR,
(*Defendants in Court below*),
APPELLANTS;

AND

ROBERT J. INGLIS,
(*Plaintiff in Court below*),
RESPONDENT.

Procedure—Husband and wife—Wife erroneously described as separated as to property—Exception to the form—Amendment—Husband summoned only to authorize his wife—Cannot be made a party personally on motion to amend.

HELD:—1. The fact that the wife has assumed the quality of separated as to property, in a deed of lease to her, does not debar her, in an action against her in that quality, from pleading by exception to the form, and proving, that she is common as to property with her husband.

2. The plaintiff, under such circumstances, will be allowed to amend the writ and declaration by describing the wife as common as to property.

3. Where the husband has been summoned merely for the purpose of authorizing his wife (defendant), the plaintiff will not be allowed, on a motion to amend the original writ and declaration, to make the husband a party to the action personally, without summoning him in his personal capacity.

APPEAL from the following judgments of the Superior Court, Montreal (JETTÉ, J.), July 7, 1891:—

"La Cour, parties ouïes sur l'exception à la forme plaidée par la défenderesse;

"Considérant que la déclaration de la dite défenderesse au bail alléguée contre elle, la rend non recevable à invoquer un état différent de celui qu'elle s'est donné au dit acte;

"Renvoie la dite exception avec dépens, distraits, etc."

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" La Cour, parties ouïes sur la motion pour amender le bref et la déclaration en cette cause, comme suit :—

1o. En retranchant du dit bref les descriptions des dits défendeurs telles qu'elles y sont contenues et en y substituant les suivants, savoir :

' Dame Mary O'Connor, of the city and district of Mon-
' treal, *marchande publique* and boarding house keeper, wife
' common as to property of William Flood of the same
' place, and the latter, as well personally as to authorize
' his said wife ; '

2o. En insérant dans la déclaration du demandeur, immédiatement avant les conclusions, l'allégation suivante : ' That the said female defendant is a *marchande publique*, ' carrying on business in the city and district of Montreal, ' as a boarding house keeper, and leased the premises in ' question from the plaintiff for purposes of her said business ; '

3o. En retranchant les mots ' that the said female defendant be then and there,' dans la première ligne du dernier paragraphe des conclusions du demandeur, et en y substituant les suivantes, savoir : " that the said defendants be jointly and severally ; '

" Considérant qu'il n'est pas contesté que le bail invoqué par le demandeur a été consenti à la défenderesse, en sa qualité de *marchande publique*, et pour y tenir son commerce de maîtresse de pension ; et que la maison louée a été ensuite habitée par elle, de mai 1890 à la date de la saisie ;

" Considérant que cet engagement de la femme lie son mari ;

" Vu les articles 179 et 1290 du Code Civil ;

" Considérant en outre que le mari, mis en cause simplement pour assister sa femme, est sorti du rôle qui lui était assigné, et s'est joint à la défenderesse pour plaider à l'action avec elle ;

" Considérant que, dans ces circonstances le demandeur est fondé à vouloir l'appeler personnellement en cause, et qu'il y a lieu en conséquence de lui accorder la permission d'amender qu'il sollicite ;

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"Accorde la dite motion du demandeur en date du 16 juin dernier, à toutes fins que de droit et ce, sans frais."

To an action for $4,680, rent to accrue for the balance of a seven years' lease, the appellants (defendants) pleaded the following exception to the form :—

"And the said defendants, for exception to the form of the action and *demande* of the said plaintiff, say :—

"That the writ and declaration of the said plaintiff herein is and are irregular, insufficient, null and void, and the said action should be hence dismissed for the following among other reasons :—

"Because in the writ of *saisie-gagerie* herein issued the said female defendant is described as "wife, separate as to property, of William Flood," the said other defendant —whereas, in truth and in fact, the said defendants were and are common as to property, having been married in this province without any ante-nuptial contract.

"Wherefore defendants pray that said action be hence dismissed, with costs *distraits* to the undersigned."

The respondent (plaintiff) answered as follows :—

"And the said plaintiff for answer to the exception to the form herein filed by the said female defendant, says :

"That each, all and every, the matters and things in said exception to the form, set forth and contained, are false and untrue, and hereby specially denied by the said defendant ;

"That the said female defendant having taken the quality of wife separate as to property, and declared herself to be such in an authentic document, to wit, in the deed of lease which forms the basis of this action, she cannot now take exception to her description as contained in the writ in this case, nor contradict the same ;

"Wherefore the plaintiff prays for the dismissal of the said exception with costs, *distraits* to the undersigned attorneys."

The plaintiff moved to amend the writ and declaration as follows :—

"Motion on behalf of said plaintiff:

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"Without in any way admitting the exception to the form herein filed by the said female defendant, and under reserve of plaintiff's answer thereto; whereas in the authentic deed of lease which forms the basis of the present action, the said female defendant described herself as wife separate as to property of and from William Flood and declared herself therein to be such;

"Whereas the said female defendant claims by her said exception to the form that she is not separate as to property, but is in community of property with the said William Flood;

"Whereas, if there is error in plaintiff's writ and declaration it is solely due to the said female defendant's false representation;

"The plaintiff therefore moves that in the event of its being proved that the said female defendant is common as to property with the said William Flood, that the said plaintiff be permitted to amend his writ and declaration in the following manner, to wit:—

1st. By striking out from the said writ the descriptions of the said defendants as now therein contained, and substituting the following, namely—'Dame Mary O'Connor, 'of the city and district of Montreal, *marchande publique* 'and boarding house keeper, wife common as to property 'of William Flood, of the same place, and the latter as 'well personally as to authorize his said wife.'

2nd. By inserting in the plaintiff's declaration immediately previous to the conclusions thereof, the following allegation, namely—'That the said female defendant is a '*marchande publique*, carrying on business in the city and 'district of Montreal as a boarding house keeper, and leased 'the premises in question from the plaintiff for purposes 'of her said business.'

3rd. By striking out the words 'that the said female defendant be then and there,' in the first line of the last paragraph of plaintiff's conclusions, and substituting therefor the following, namely—'that the said defendants 'be jointly and severally,' the whole with costs against the said female defendant, *distraits*, etc."

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Nov. 18, 1891.]

A. W. Smith for appellants :—

The action was instituted on the 8th of June last, for the sum of $4,680, rent to accrue for the balance of a seven years' lease, viz., six years. This lease is signed by the female defendant alone. The action is accompanied by a *saisie gagerie*, and a personal condemnation is sought in this sum against the female defendant only, who is described in the writ as "wife separate as to property, of William Flood." The latter was made a party in the suit, "for the purpose of authorizing his said wife."

The defendants appear as they are sued, *i.e.*, the female defendant personally, and the male defendant for the purpose of authorizing his said wife. They join in an exception to the form. The female defendant, against whom alone condemnation is sought, alone pleads to the merits. The exception to the form sets out that the female defendant is wrongly described in the writ as "separate as to property. That she is in reality common as to property with her husband, and has been improperly impleaded.

Upon this exception being filed, the plaintiff made a motion conditional in its terms, praying "that in the "event of it being proved that the female defendant is "common as to property with her husband," the plaintiff be permitted to amend by so changing her description in the writ and declaration, by adding a clause to the effect that she was *marchande publique*, and had signed this lease in the course of her business, and finally by bringing in the male defendant personally, and in the conclusion seeking a personal condemnation against him.

It would seem that such a motion could be granted only in the case of "it being proved that the female de- "fendant is common as to property with her husband." If that was proved, the exception must hold good. If, on the other hand, the exception was dismissed because it was *not* proved that the said female defendant was common as to property, by its own terms the motion was abandoned, and could not be granted.

The exception and the motion were submitted together. The exception was dismissed, and the motion granted.

Taking, first, the judgment dismissing the exception. It is shown by a copy of the marriage certificate that the defendants (appellants) were married in this province without any ante-nuptial contract—indeed, they are described in the action as "judicially separate." No such judgment of separation was ever rendered—the plaintiff did not seek to establish that there ever had been, but rested his whole argument upon the objection that the female defendant having allowed herself to be so described in an authentic deed, it could not be disputed. The judgment is also based solely upon this ground. It need scarcely be pointed out that the fact of her being so described in an authentic deed does not make proof. The deed proves only what took place before the notary. It proves that she called herself—or allowed herself to be called—" wife, separate as to property, of William Flood." It seems absurd to say that the law, which declares that a married woman, common as to property, cannot without her husband's authority, thus bind either herself or her husband, and that such acts on her part are absolutely null, can be over-ridden by her by simply going before a notary without her husband's knowledge or consent, and describing herself as separate as to property: that if she does this, it is then incompetent on her part, or on the part of her husband, to disclose to the Court her real status.

Art. 183, C. C., in express terms gives to the wife herself, to her husband, and to anyone who has an interest in so doing, the right to plead the want of authorization by the husband—it is a cause of nullity which nothing can cover. Surely this implies that the wife herself or her husband may, when she is sued as separate as to property, inform the Court that she is in reality common as to property, and that consequently, even if the act be one of administration (which it is not in the present case), her husband's authorization was necessary, and lacking that, the act is a nullity. (177, 183, 1292, 1301 C. C.) If

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not, then she and her husband are estopped from pleading this want of authorization.

The plaintiff replies that the husband might object to her description, but not the wife herself; that she would thus be taking advantage of her own fraud. In the first place there is no fraud whatever shown. It is true she wrongly described herself — or allowed herself to be wrongly described. If she did that fraudulently, she is open to an action of damages to the extent to which plaintiff may be injured, but her mere declaration — what she may have thought from the fact that she was conducting the boarding house herself, and without her husband's interference—would not alter the law.

Further than this—the husband does object to this description. He at least is no party to the contract. It was signed without his knowledge or consent. He is called into the suit for the purpose of giving him an opportunity of doing what he is now doing, *i.e.*, of watching the proceedings, and seeing that his wife is properly impleaded. He is called upon to authorize his wife to plead to an action taken against her as "separate as to property." By this exception, he replies, "I refuse to authorize my wife—she is not separate, but common as to property." Clearly he has a right to raise this question, and it is even a duty incumbent upon him.

By the exception it is urged that the female defendant is not "separate" but is common as to property—that she is wrongly impleaded. In the plea to the merits filed by her, the same grounds are set up, viz., that she is common as to property, and incompetent to sign this seven years' lease and so bind the community. Thus the question raised by her exception, while properly a matter affecting the form of plaintiff's action, yet directly touches the *fond* of the whole action. An action brought against her as common as to property would be a new action calling for a new defence. If, as is the case, the Court has taken it to be true that the defendants (appellants) are common as to property, and if it is competent for them to raise that point, then the judgment should have maintained

their exception and dismissed the plaintiff's (respondent's) action.

The judgment upon plaintiff's motion for leave to amend, the appellants submit, should also be reversed and the motion dismissed. The appellants contend as above, that the exception to the form strikes at the *fond* of the action. If maintained, it must entail the dismissal of the plaintiff's action. The amendments clearly change the nature of the demand. The judgment permitting them practically throws defendants out of Court upon the issues raised by them, and calls upon them to answer an action different in its nature. Without a new summons—indeed, so far as the male defendant personally is concerned, without ever having been summoned—the defendants are called by the amendment to plead to a new action. The male defendant was summoned in a certain quality; that is, as head of the household—as a sort of guardian over his wife. In that quality his rights and capacity as a litigant are limited. He is restricted to those grounds which he, as having authority over his wife, may take, *i.e.*, he is interested in the suit only to the extent of seeing that his wife is properly impleaded. By a mere motion—which is not served upon him personally—a new action is brought against him himself, and a personal condemnation is sought against him, without summons.

The amendments make out a new action against the wife. Their value and service to the plaintiff's action may be questioned, *i.e.*, whether even then, as it stands, it is properly brought, but it is certain this judgment changes the action. From an action against the wife, separate as to property—based upon a written contract—it reduces it to one against the community, based upon an allegation that the wife had authority to so bind the community for the purpose of her boarding house.

The appellants do not wish to drag into the present argument a discussion of the merits of the whole action,

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but it may be not improper to submit that the plaintiff's recourse, if any he have, is not to be based upon the contract signed by the wife (and which she could not invoke against respondent in any way), but rests upon the occupation of the premises subsequent to the first of May, and is against the community, *i.e.* the husband alone, as its head and representative. (Arts. C. C. already cited).

Duclos, for the respondent.

Nov. 27, 1891.]

LACOSTE, Ch. J.:—

Appel d'un jugement renvoyant une exception à la forme, et accordant une motion pour amender le bref et la déclaration.

L'intimé prend action contre l'appelante qu'il désigne dans le bref comme séparée de biens, et il assigne le mari pour autoriser son épouse.

Les appelants prôduisent une exception à la forme basée sur le fait que la femme est commune en biens.

L'intimé, dans sa réponse à l'exception, nie le fait, et allègue de plus que l'appelante ayant pris la qualité de femme *séparée de biens* dans le bail qui sert de base à l'action, ne peut invoquer sa qualité de *commune* à l'encontre de l'action.

En même temps que sa réponse, l'intimé a produit une motion, pour qu'il lui fût permis, au cas où l'appelante prouverait sa qualité de commune, d'amender son bref en désignant l'appelante comme commune en biens, et en assignant le mari "tant personnellement" que pour autoriser son épouse ; d'amender sa déclaration en alléguant que l'appelante est marchande publique et a loué les lieux pour les fins de son négoce, (dans le bref la femme est désignée comme marchande publique), et en ajoutant aux conclusions une condamnation solidaire contre la femme et le mari.

L'appelante a produit son extrait de mariage, qui atteste que le mariage a été célébré dans la province.

L'audition sur l'exception et la motion a eu lieu en même temps, et la Cour de première instance a renvoyé

l'exception avec dépens, et a accordé la motion sans frais.

Le motif du jugement sur l'exception est que la déclaration de l'appelante au bail, la rend non recevable à invoquer un état différent de celui qu'elle s'est donné à l'acte.

Les motifs du jugement sur la motion sont : Qu'il n'est pas contesté que le bail a été consenti par l'appelante èsqualité de marchande publique ; que cet engagement lie le mari ; que le mari est sorti de son rôle en plaidant à l'action conjointement avec la femme.

Sur l'exception : il ne s'agit pas ici d'un simple changement de nom ou de qualité, comme dans la cause de *Hudon* v. *Raineauld*, 6 Leg. News, 107, citée par l'intimé.

L'état de la femme mariée sous le régime de la communauté est de droit public, et peut être invoqué nonobstant toute déclaration à ce contraire. Merlin, Droit Public, Nos. 4 et 23.

L'intimé invoque l'article 1210, C. C., qui veut que l'acte authentique fasse foi complète entre les parties de ce qui y est exprimé en termes énonciatifs ayant un rapport direct à l'obligation ou à l'objet qu'avaient en vue les parties en passant l'acte.

Les énonciations relatives aux qualités des parties font foi que ces qualités ont été réellement prises par les parties, mais la vérité ou la sincérité de ces déclarations peut toujours être combattue par la preuve contraire. Sirey, C. N., sous l'art. 1319, Nos. 7-17.

L'intimé prétend que le mari s'étant joint à la femme dans l'exception, deux défendeurs ne peuvent pas invoquer des moyens qui sont personnels à l'un d'eux. A l'appui il cite la cause de *Huntingdon* v. *Ford*, 22 L. C. J. 279. Dans cette cause c'est l'intervenant Short qui fesait valoir des moyens personnels au défendeur Ford. Ici l'appelant ne plaide que dans la qualité dans laquelle il est assigné, c'est-à-dire pour autoriser sa femme. Comme mari il avait d'ailleurs droit d'invoquer la fausse désignation de l'état et de la qualité de sa femme.

L'intimé prétend que la déclaration faite par la femme

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établit une preuve qui l'emporte sur la présomption créée par l'extrait de mariage.

Le mariage sans preuve de contrat établit une présomption de communauté légale (art. 1260, C. C.), que l'aveu extra judiciaire de la femme ne saurait détruire. Dans l'espèce la preuve de la séparation devrait résulter du jugement en séparation de biens, et peut-être de son exécution.

Nous croyons donc l'exception à la forme bien fondée.

Sur la motion pour amender :

Les appelants se plaignent que la motion est conditionnelle, en ce sens que l'intimé ne demande d'adjuger sur icelle que dans le cas où l'appelante établirait sa qualité de commune.

C'est une irrégularité, mais nous ne croyons pas qu'elle soit fatale dans les circonstances.

Les amendements demandés sont de deux sortes, les uns concernant la femme et les autres concernant le mari.

En ce qui regarde la femme, l'intimé demande à amender le bref et la déclaration de manière à ce qu'elle soit désignée comme commune en biens au lieu de séparée de biens, et à ce qu'il soit allégué dans la déclaration qu'elle a consenti le bail comme marchande publique et pour les fins de son négoce. En ce qui regarde le mari l'intimé demande à ce que le bref et l'action soient amendés de manière à l'inclure personnellement dans l'action, en ajoutant dans l'assignation les mots "tant personnellement," et en prenant des conclusions solidaires contre lui et contre sa femme.

Nous pensons qu'il y a bien jugé en ce qui concerne les amendements relatifs à la femme. C'est la femme qui a induit l'intimé en erreur. Bien qu'elle puisse invoquer sa qualité de commune, cependant nous ne voyons aucune objection à ce que la Cour, sur la demande de l'autre partie rétablisse les faits et permette d'amender le bref et la déclaration. L'art. 53 du C. P. C. est invoqué avec raison sur ce point : la nature de l'action n'est pas changée.

Les amendements concernant le mari sont inutiles, à moins que l'intimé n'ait l'intention de faire de la présente

action une action contre le mari. Les amendements ne changeraient pas la nature de la demande contre la femme, mais ils fusionneraient avec l'action contre la femme une nouvelle action contre une personne qui n'est pas en cause personnellement, et tenderaient à donner à cette nouvelle action un effet rétroactif en l'incorporant à l'action de la femme. L'art. 53, C. P. C., n'autorise pas une telle procédure.

Des précédents en Cour Supérieure qui s'appliquent plus ou moins, ont été cités. A l'encontre on a cité les causes de *Chisholm* v. *Langlois*, M. L. R., 1 C. S. 190 ; *Styles* v. *Myler*, 11 Leg. News, 357, qui s'appliquent aussi plus ou moins à la question.

On a cité la cause de *The Eastern Townships Bank & Morrill*, 1 Leg. News, 30, décidée par cette Cour.

Dans cette cause une société en nom collectif avait été poursuivie, les noms de deux des associés avaient été mis dans le bref ; celui du troisième avait été omis. La Cour de première instance a permis d'ajouter son nom dans le bref originaire ; signification lui a été faite de ce bref ; il a comparu, a produit une exception à la forme qui a été déboutée. Ce jugement a été renversé par la Cour de révision mais rétabli par la Cour d'appel. Sans doute cette dernière cour a été mue par un motif d'équité vu que le demandeur avait été induit en erreur par la négligence des défendeurs à faire enregistrer leur nouvel acte de société.

Quoiqu'il en soit, nous affirmons qu'un mari mis en cause pour autoriser sa femme, ne peut pas être constitué défendeur personnellement par un amendement au bref originaire, et s'il ne le peut pas le demandeur n'a pas d'intérêt à faire amender le bref dans ce sens.

Nous ne décidons pas que le demandeur ne peut pas appeler le mari en cause à cet étage de la procédure par un nouveau bref.

Dans les circonstances nous permettons de changer dans le bref et la déclaration la qualité de la femme, nous permettons d'ajouter dans la déclaration l'allégué que la femme a agi au bail comme marchande publique, et

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qu'elle a loué pour les fins de son négoce, et nous renvoyons la motion quant au surplus.

Ces amendements devront être faits dans un délai de quinze jours. Si l'intimé juge à propos de les faire l'exception sera renvoyée sans frais. S'il ne les fait pas, l'exception se trouvera maintenue sans frais, et le demandeur débouté de son action sans frais.

The judgment is as follows :—

" La Cour, etc.....

" Attendu que dans le bref et dans la déclaration l'appelante est désignée comme séparée de biens d'avec son mari, et que l'appelant son mari n'est assigné que pour autoriser son épouse ;

" Attendu que les appelants ont produit une exception à la forme dans laquelle ils allèguent que l'appelante est commune en biens avec son époux ;

" Attendu que dans sa réponse à l'exception l'intimé allègue que l'appelante, ayant pris la qualité de femme séparée de biens dans le bail authentique qui sert de base à l'action, n'est pas recevable à invoquer un état différent de celui qu'elle s'est donné au bail ;

" Attendu que l'intimé a présenté une motion pour amender le bref et la déclaration comme suit, savoir, 1o. en effaçant du bref la description des défendeurs telle qu'elle y est donnée, et y substituant la suivante, savoir, ' Dame Mary O'Connor, of the city and district of Mon- ' treal, *marchande publique* and boarding house keeper, wife ' common as to property of William Flood of the same ' place, and the latter as well personally as to authorize ' his said wife ; ' 2o. en insérant dans la déclaration du demandeur immédiatement avant les conclusions, l'allégation suivante : ' That the said female defendant is a ' *marchande publique*, carrying on business in the city and ' district of Montreal as a boarding house keeper, and ' leased the premises in question from the plaintiff for the ' purposes of her said business.' 3o. En retranchant les mots, ' That the said female defendant be then and there ' dans la première ligne du dernier paragraphe des con-

clusions du demandeur, et les remplaçant par les suivants, 'that the said defendants be jointly and severally;'

"Attendu que par deux jugements dont est appel, rendus le 7 juillet 1891, la Cour de première instance, savoir, la Cour Supérieure siégeant à Montréal, a accordé la motion sans frais et renvoyé l'exception avec dépens;

"Considérant que bien que la femme ait pris la qualité de femme séparée de biens dans le bail, cependant elle est toujours recevable à invoquer son état de femme commune;

"Considérant que les énonciations relatives à la qualité des parties dans un acte authentique, bien qu'elles fassent foi que ces qualités ont réellement été prises par les parties, n'établissent pas la vérité et la sincérité de ces déclarations au point d'empêcher la preuve du contraire;

"Considérant qu'il a été prouvé que la femme est commune en biens;

"Considérant que dans l'espèce, l'intimé qui a été trompé par la qualité prise par l'appelante, est bien fondé à amender le bref et la déclaration de manière à changer l'énonciation relative à la qualité de l'appelante;

"Considérant que l'intimé ne peut amender le bref et la déclaration en ce qui concerne l'appelant;

"Considérant qu'il y a erreur dans les deux jugements dont est appel, maintient le présent appel, et casse les deux jugements dont est appel; et procédant à rendre le jugement que la Cour de première instance aurait dû rendre;

"Accorde la motion de l'intimé quant aux amendements suivants, savoir, l'amendement décrit en premier lieu, en en retranchant toutefois les mots 'as well personally as,' qui se rapportent au mari, et l'amendement décrit en second lieu en son entier, lesquels amendements doivent être faits sous quinze jours du présent jugement, et rejette la motion quant au surplus;

"Et vu les amendements ci-dessus qui sont permis;

"Il est ordonné que si l'intimé à l'expiration du délai de quinze jours ci-dessus fixé, a amendé le bref et la déclaration ainsi qu'il lui est permis de faire par le présent

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jugement, l'exception à la forme se trouvera dès lors renvoyée sans frais, sans qu'il soit besoin d'aucun ordre ultérieur pour la renvoyer, et si, au contraire, l'intimé n'a pas amendé à l'expiration du dit délai la dite exception à la forme, elle se trouvera maintenue sans frais, et le dit intimé sera débouté de son action sans frais, sans autre ordre ultérieur ;

" Et la Cour condamne l'intimé à payer aux appelants les frais encourus sur le présent appel, distraction desquels frais est accordée, etc."

Judgment reformed with costs.

Maclaren, Leet, Smith & Smith, for appellants.
McCormick, Duclos & Murchison, for respondent.
(J. K.)

November 21, 1891.

Coram LACOSTE, Ch. J., BOSSÉ, BLANCHET, WURTELE, TAIT, JJ.

WOODS v. REGINAM.

Writ of error—Plaintiff in contempt.

HELD:—That where the plaintiff in error, who had been convicted of a misdemeanour, was liberated on bail to appear at the ensuing term of the Court of Queen's Bench sitting in appeal and error, and on his default to appear his bail was declared forfeited, he is not entitled to be heard by counsel on the merits of the case, in his absence.

The plaintiff in error, while undergoing his sentence for a misdemeanour, was admitted to bail to appear at the ensuing term of the Court of Queen's Bench sitting in appeal and error, to abide the decision of the Court on the writ of error. (See *ante*, p. 163).

The plaintiff being called and having made default, *St-Jean*, for the Crown, moved that inasmuch as he had not appeared before the Court as required by the conditions of the bond, his bail be declared forfeited.

His sureties were called, and default being entered, it was ordered as prayed.

Later in the day, the case was reached in its place on the roll, on the merits of the writ of error.

W. A. Weir appeared for the plaintiff in error.

St-Jean, for the Crown, submitted that the case could not be heard in the absence of the plaintiff in error, his bail having been forfeited, and he being in contempt of Court.

Weir, in reply, contended that the offence being a misdemeanour, the plaintiff in error might be heard by counsel in his absence.

The Court, after taking time to consider, decided that the plaintiff in error, being in contempt, and his bail having been forfeited, was not entitled to be heard by counsel in his absence.

St-Jean for the Crown.

W. A. Weir for the plaintiff in error.

(J.K.)

November 26, 1891.

Coram LACOSTE, CH. J., BABY, BOSSÉ and WURTELE, JJ.

CHARLES BAZINET ET AL.,
(*Defendants in Court below*),
APPELLANTS;

AND

LÉON GADOURY, FILS,
(*Plaintiff in Court below*),
RESPONDENT.

Water-course—Floatable river—Seigniorial rights—C. S. L. C., ch. 51—Expertise—Direct action—Conclusions.

HELD:—1. Since the abolition of seigniorial rights a servitude alleged to have been acquired from the seignior previously, for the construction of dams, without payment of indemnity, has no effect.

2. Ch. 51, C. S. L. C. applies to floatable as well as non-floatable rivers.

3. The remedy given by ch. 51, C. S. L. C., to a person who is damaged by the construction of a dam on a water-course, is not exclusive, and

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does not deprive him of the ordinary remedy by action before a competent Court.

4. Where in such action the plaintiff prays for the demolition of the dam, and for damages, a judgment which orders the payment of damages as awarded, and, in default of payment within the delay fixed, orders the demolition of the dam, is not *ultra petita*.

APPEAL from a judgment of the Court of Review, Montreal, reversing a judgment of the Superior Court.

An *expertise* was ordered by the following judgment of the Superior Court, Joliette (CIMON, J.), April 10, 1885:—

"La Cour ayant entendu les parties par leurs avocats respectifs, sur la motion des défendeurs, demandant le rejet des exhibits Nos. 1 et 3 du demandeur et sur le mérite de l'action, examiné la procédure et la preuve au dossier et délibéré;

"Adjugeant d'abord sur les deux réponses en droit du demandeur aux exceptions des défendeurs, vu que preuve a été ordonnée avant faire droit;

"Considérant que la première réponse en droit, étant celle à l'encontre de l'exception en premier lieu plaidée, n'était fondée que pour l'allégation de l'exception citée en la dite réponse en droit et commençant ainsi: 'que les défendeurs ont un droit de servitude sur les terrains en troisième et quatrième lieu désignés en la déclaration, etc.,' en tant que les dits défendeurs n'alléguaient pas et ne montraient pas un titre établissant cette servitude; mais considérant que depuis l'amendement du 14 novembre dernier, les défendeurs ont allégué qu'ils sont propriétaires et en possession de certains terrains bordés, longés et traversés par la dite rivière Noire, et qu'ils sont en conséquence autorisés à utiliser et exploiter le cours d'eau qui borde, longe et traverse ainsi leurs terrains, et que la Cour peut en conclure que la servitude réclamée par les défendeurs est la servitude légale établie en pareil cas par le ch. 51, S. R. B. C.;

"Considérant que le ch. 51, S. R. B. C., s'applique à tout cours d'eau, par conséquent à une rivière flottable comme à une rivière non flottable; que ces termes: 'tout cours d'eau,' doivent s'interpréter dans leur sens large,

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vu que ce statut a été passé pour encourager le développement de l'industrie et de la colonisation, en permettant la construction de moulins aux conditions y mentionnées ;

" Considérant que le dit chap. 51, S. R. B. C., est une autorisation aux défendeurs d'exploiter le cours d'eau, appelé en cette cause la Rivière Noire, vis-à-vis leurs terrains qu'il borde, longe et traverse, et à cette fin d'y construire une chaussée et même de causer, par l'élévation des eaux provenant de l'écluse, des dommages en inondant les terrains au-dessus, les défendeurs n'étant seulement soumis qu'à payer les dommages causés ;

" Considérant que le demandeur ne peut obtenir la démolition de la chaussée à cause de ces dommages qu'au cas où il ne serait pas payé, tel que décrit au dit chap. 51, S. R. B. C. ;

" Considérant que depuis l'amendement susmentionné la dite réponse en droit n'est pas fondée ;

" Considérant que les autres parties de la dite réponse en droit, n'étaient pas et ne sont pas fondées ;

." Considérant que les défendeurs en alléguant qu'ils ont requis, avant l'action, le demandeur de signer un compromis pour nommer des experts afin de constater les dommages, ce à quoi il se serait refusé, ne le font pas comme fin de non recevoir à l'action et ne concluent pas au renvoi de l'action pour cette raison, mais disent cela, afin de montrer qu'ils ont toujours été prêts à constater ces dommages, fait qui peut être pris en considération par la Cour dans une action de la nature de celle-ci ;

" Considérant que les défendeurs avaient le droit dans leur exception, de suggérer à la Cour et même de lui demander de procéder à faire constater les dommages au moyen d'une expertise, renvoie cette dite première réponse en droit, mais sans frais ;

" Et sur la deuxième réponse en droit du demandeur, étant celle à l'encontre de la deuxième exception des défendeurs ;

" Considérant que ce n'est qu'après avoir pris connaissance des actes qui n'étaient pas allégués en la dite exception *comme en faisant partie*, et de la preuve, que cette

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Cour pouvait dire si les titres invoqués, ont légalement et de fait constitué sur les terrains du demandeur les servitudes mentionnées en la dite exception, et que quant aux autres allégations de la dite exception, elles étaient fondées en droit et ne pouvaient être attaquées par réponse en droit ;

" Ordonne que chaque partie paye ses frais sur cette deuxième réponse en droit ; étant inutile d'adjuger plus spécialement sur icelle, le jugement qui va venir ci-dessous disposant des questions soulevées par cette réponse en droit ;

" Adjugeant sur la dite motion ;

" Considérant que le demandeur n'allègue dans sa déclaration aucun titre spécial de propriété, se contentant d'alléguer qu'il est propriétaire des terrains y décrits, et, en conséquence, les dits exhibits mentionnés en la dite motion n'étaient pas des pièces invoquées dans la déclaration au soutien de la demande, (C. proc : art. 99, 106) ;

" Considérant que les défendeurs n'ont pas demandé, avant de plaider, que le demandeur produise ses titres de propriété, s'il en avait ;

" Considérant qu'après avoir été forclos de plaider les défendeurs ont assisté à l'enquête *ex parte* que faisait le demandeur et transquestionné les témoins produits, couvrant par là les irrégularités de la forclusion s'il en existait ;

" Considérant que les exhibits mentionnés en la dite motion, ont été produits à l'enquête *ex parte* par le témoin Belleville entendu *ex parte* le 10 mai 1884, ainsi que les défendeurs le disent dans leur motion, sur lesquels exhibits le dit témoin a été questionné ; et les défendeurs ont alors transquestionné le témoin bien qu'ils se soient objectés à la production à l'enquête de ces exhibits, objection que la Cour a réservée, la cause étant alors *ex parte*, et les défendeurs se sont réservés le droit de faire une motion pour en demander le rejet du dossier, et tout cela apparaît par la déposition du témoin Belleville ;

" Considérant que ce n'est qu'après cela que les défen-

deurs ont obtenu permission de plaider et qu'ils ont plaidé au mérite ;

" Considérant que les défendeurs n'ont pu être surpris ;

" Considérant que les dits exhibits ont été ensuite régulièrement produits le 10 décembre 1884 à l'enquête avec la liste d'exhibits, et tel que cela appert au plumitif et au dos de la liste, l'enquête étant alors après contestation ;

" Considérant que par l'article 213 du Code de Procédure, les dits exhibits pouvaient être produits à l'enquête, sauf les frais résultant de cette tardive production qui doivent être à la charge de la partie qui les produit ;

" Considérant que les exhibits sont au dossier et qu'il n'appert pas d'ailleurs que les défendeurs aient souffert ou souffrent aucun préjudice de la manière dont ils ont été produits, et qu'ils sont régulièrement au dossier ;

" Renvoie la dite motion avec dépens ;

" Et sur le mérite de l'action, considérant que l'acte du 2 mai 1857 (commission par Dame T. E. Panet à Martin Guilbault) étant l'exhibit No. 2 des défendeurs, n'a pu créer sur la terre y décrite et concédée au dit Guilbault une servitude réelle *de souffrir l'inondation que la chaussée des défendeurs peut y causer*, l'acte ne mentionnant pas cela, que d'ailleurs dans l'acte, aucun fonds dominant n'y est spécifié, et que, de plus, les réserves étant dans l'acte de concession même étaient illégales, (S. R. B. C., chap. 41, sect. 31-32) ;

" Considérant que si l'acte du 9 septembre 1857, vente par Dame Thérèse Eugénie Panet à Elie Bédard, étant l'exhibit No. 3 des défendeurs, a pu créer une servitude réelle sur le fonds vendu à Elie Bédard, au profit du pouvoir d'eau y mentionné, cette servitude n'a pas été transmise aux défendeurs, avec le dit pouvoir d'eau, attendu que dans leur contrat d'acquisition du 4 mai 1881, vente d'un pouvoir d'eau par Jérôme Robillard, ès-qualité, à Pierre Ed. McConville et Charles Bazinet, étant l'exhibit No. 13 des défendeurs, 'il est de plus convenu et entendu entre les parties que dans le cas que les dits acquéreurs ou leurs successeurs feraient des chaussées qui feraient monter l'eau et par là causeraient des dommages aux pro-

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priétaires qui se trouvent en haut du dit pouvoir d'eau, alors et au dit cas, les acquéreurs seront tenus et responsables des dits dommages ;'

"Considérant que les défendeurs n'ont pas au profit de leur moulin, sur les terrains du demandeur, la servitude réelle qu'ils prétendent avoir été créée par les actes susdits du 2 mai 1853 et du 9 septembre 1857 ;

"Considérant que les défendeurs sont propriétaires du terrain où se trouve leur moulin à scie mentionné en l'action (*vide* le protêt du 29 octobre 1881 par Thaddé Barthe dit Belleville et Léon Gadoury contre les défendeurs et autres, exhibit No. 4 du demandeur produit avec son action), et que ce terrain est longé par la dite rivière Noire, et que par la loi, ils étaient autorisés à construire une chaussée dans la dite rivière pour faire mouvoir leur moulin et même de faire refluer l'eau sur les terrains du demandeur qui sont par la loi assujettis à cette servitude, à charge seulement de payer les dommages ;

"Considérant que le demandeur est propriétaire des terrains suivants décrits en deuxième, troisième et quatrième lieu en la déclaration, savoir : 2o. Une terre sise et située dans la même paroisse de St-Damien, dit district de Richelieu, de deux arpents et demi de largeur sur vingt-cinq arpents de longueur, bornée d'un côté au nord par Léon Gadoury, père, de l'autre côté au sud par une autre terre du demandeur, à l'est par le douzième rang du township Brandon et à l'autre bout, à l'ouest par le lac noir ; 3o. Une terre située dans la paroisse de St-Jean de Matha, district de Joliette, de forme irrégulière, d'environ cent arpents en superficie, bornée par le lac noir, au sud et au sud-est, au sud-ouest par la rivière noire, et au nord et au nord-est par une autre terre du demandeur ; 4o. Une terre située dans la paroisse de St-Jean de Matha, district de Joliette, de deux arpents de largeur sur seize arpents de profondeur, bornée par une autre terre appartenant au demandeur, de l'autre côté au nord par Joseph Riendeau ou une terre abandonnée, à l'est par une autre terre appartenant au demandeur, et à l'ouest par Thaddé Belleville ;

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"Considérant que la chaussée construite par les défendeurs et dont il est fait mention dans l'action parait faire refluer l'eau sur les terrains ci-dessus mentionnés appartenant au demandeur, mais qu'il convient de s'assurer davantage de ce fait au moyen d'une expertise régulière, et aussi de s'assurer par la même expertise du montant des dommages qui peuvent résulter au demandeur ;

"Considérant que le demandeur n'a montré aucun intérêt à se plaindre de ce que la dite chaussée, en barrant la rivière, peut nuire ou nuit aux intérêts de flottage sur la dite rivière ;

"Considérant qu'il a droit de réclamer les dommages que cette chaussée peut lui causer, en faisant refluer l'eau sur ses terrains ;

"Considérant que l'expertise et les rapports d'experts mentionnés en l'action sont nuls et de nul effet, n'étant basés sur aucun compromis écrit des parties, et les dits experts ayant procédé irrégulièrement et sans juridiction ;

"Avant d'adjuger définitivement, la Cour ordonne que des experts, dont les parties conviendront ou qui seront nommés suivant la loi, constatent après avoir entendu les parties et leurs témoins, les faits suivants et en fassent rapport à cette Cour :

1o. La distance de la chaussée des défendeurs à chacune des trois terres ci-dessus décrites du demandeur ;

2o. La différence du niveau de l'eau entre la dite chaussée et la tête de l'eau à la décharge du lac noir ;

"3o. La différence du niveau de l'eau entre la dite chaussée et le lac noir, vis-à-vis chacune des trois terres du demandeur ;

4o. La profondeur de l'eau de la rivière Noire au centre de la chaussée, la profondeur de l'eau à la décharge du lac noir et la profondeur de l'eau immédiatement au-dessus de la dite décharge ;

5o. La largeur de la rivière Noire à la décharge du lac noir, et sa largeur à la chaussée ;

6o. La hauteur de la chaussée à partir du lit de la rivière ;

7o. Si, dans leur opinion et donnant les raisons et les

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faits à l'appui de cette opinion, la chaussée fait refluer l'eau sur les terrains ci-dessus décrits du demandeur, et à quelles parties de l'année a lieu l'inondation, pendant combien de temps chaque fois, l'eau ainsi refluée, séjourne sur le dit terrain, et les experts feront toutes les opérations nécessaires, dont ils feront rapport à cette Cour, pour constater cela; les experts diront, si, indépendamment de la chaussée, les dits terrains du demandeur seraient inondés, et dans ce cas, ils distingueront combien d'étendue des terrains du demandeur la chaussée seule fait inonder, et combien d'étendue serait inondée si la chaussée n'existait pas, et ils distingueront aussi si la dite chaussée fait tenir l'inondation sur les dits terrains plus longtemps qu'elle n'existerait, sans elle, et pendant combien de temps et combien de fois dans l'année;

8o. Les experts examineront la chaussée, les empellements qu'elle peut avoir, la hauteur et largeur de ces empellements, et ils diront si ces empellements, étant tenus ouverts, la chaussée contribue encore à l'inondation des terrains du demandeur, et si oui, de combien, en donnant toutes les particularités à ce sujet, quant à l'étendue des terrains, la durée et les époques de l'inondation;

9o. Quels dommages et leur valeur la chaussée a pu causer au demandeur par cette inondation, depuis sa construction, à venir au 13 février 1884, date de l'action; si ces dommages seront permanents tant que la chaussée existera, et quels sont ces dommages et leur valeur annuellement; les dits experts distingueront les dommages causés indépendamment de la chaussée, de ceux causés uniquement par la chaussée, de manière que les dommages qu'ils rapporteront ne seront que les dommages additionnels causés par la chaussée, c'est-à-dire les dommages en sus de ceux qui seraient causés, sans la chaussée, les dits experts devant avoir égard à la plus value que la proximité du moulin des défendeurs peut donner aux terrains du demandeur;

10o. Les experts constateront de plus quel était l'état de la rivière Noire avant les travaux faits en l'été 1881, pour

creuser la décharge du lac noir, pour dire de combien ces travaux ont fait baisser l'eau du lac noir;

11o. Les travaux faits dans la dite décharge ont-ils diminué la valeur du pouvoir d'eau des défendeurs, où se trouve leur chaussée, fait que les experts devront aussi constater;

12o. Quels dommages cela a-t-il causé aux défendeurs;

13o. Si la décharge du lac noir n'eût pas été creusée, en l'été 1881, la chaussée pouvait-elle contribuer à l'inondation des terrains du demandeur, et quelle serait cette contribution;

"Et les dits experts accompagneront leur rapport d'un plan signé par eux, et figuratif des lieux, et feront rapport aussi des dépositions des témoins et de tous écrits ou documents produits entre leurs mains, et du tout feront rapport d'ici au 25 juin prochain."

The final judgment was rendered by the Superior Court, Joliette (TASCHEREAU, J.), 16 Feb. 1888, as follows:—

"La Cour, ayant entendu les parties par leurs procureurs respectifs, tant sur la motion du demandeur demandant l'homologation du rapport de l'expert Beaudry, produit en cette cause, et sur la motion des défendeurs demandant le rejet du dit rapport, que sur le mérite final de la présente cause; ayant de plus examiné la procédure, la preuve, le dit rapport d'expert et généralement toutes les pièces du dossier, et sur le tout délibéré;

"Vu le jugement de cette Cour en date du 10 avril 1885, lequel refuse de reconnaître au demandeur le droit de demander la démolition de la chaussée des défendeurs, et limite le litige à la question des dommages à être constatés par expertise;

"Considérant qu'il n'y a pas lieu de modifier les considérants ni le dispositif du dit jugement, par lequel les autres questions de droit et de procédure soulevées dans l'instance, en outre de celle déjà mentionnée et relative à la démolition de la dite chaussée, ont été correctement résolues;

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" Considérant que le dit rapport d'expert n'est entaché d'aucune irrégularité ou nullité, et doit être reçu, avec les témoignages et documents qui y sont annexés, comme faisant partie de la preuve dans la cause, aux termes de l'article 346 du Code de Procédure Civile, mais que le tribunal n'est pas astreint à suivre l'opinion du dit expert ;

" Considérant qu'il appert du dit rapport et de la preuve que la chaussée des défendeurs, en faisant refluer l'eau sur une partie des propriétés du demandeur, causerait des dommages sur une étendue de onze arpents et demi seulement, rendus impropres à la culture sur l'immeuble No. 585 du cadastre de St-Jean de Matha ; que ce terrain vaudrait $15 l'arpent, soit la somme de $162.50, pour les onze arpents et demi ; que les dommages causés avant l'action, répartis sur les deux années qui l'ont précédée, ne peuvent excéder la valeur annuelle de la dite étendue de terrain, soit la somme de $20.70 pour les dites deux années, et doivent être compensés par la valeur annuelle de la plus value acquise au reste du dit immeuble par le voisinage de la scierie des défendeurs, soit la somme de $19.80, pour deux années d'intérêt sur $165, montant de cette plus value, ce qui laisserait une différence de 90 centins seulement en faveur du demandeur ; différence qui est plus que couverte par l'intérêt de la plus value acquise par le voisinage de la dite scierie, aux autres immeubles du demandeur, qui n'ont pas souffert de l'inondation causée par la chaussée ;

" Considérant que le dit rapport, exact dans les données fondamentales, ne l'est pas dans la constatation des dommages, qui doivent être limités aux chiffres ci-dessus, et qui disparaissent par la compensation susdite ;

" Considérant que les dommages accrus depuis l'institution de l'action et ceux à venir ne peuvent être pris en considération par cette Cour ;

" Considérant que partant les offres faites par les défendeurs avant l'institution de l'action et consignées avec les défenses, formant avec l'intérêt accru jusqu'à la consignation, la somme de $13.32, étaient suffisantes et auraient dû être acceptées ;

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" Considérant que les offres subséquentes faites par les défendeurs, par leur motion du 11 septembre 1885, d'une somme additionnelle de $28, n'étaient faites que pour éviter les frais d'une expertise, et n'auraient lié les défendeurs que dans le cas où le demandeur aurait accepté les dites offres, ce qu'il a refusé de faire, quoique dûment mis en demeure ; qu'il n'y a pas conséquemment lieu de s'occuper des dites offres du 11 septembre 1885, auxquelles il n'a pas été donné de suite ;

" Rejette sans frais la motion du demandeur demandant l'homologation du dit rapport d'expert ; rejette aussi sans frais celle des défendeurs demandant son homologation, mais prenant le dit rapport en considération, sans en adopter toutes les conclusions, maintient la défense pour les raisons ci-haut déduites seulement, déclare bonnes, valables et suffisantes les offres faites avant l'action et consignées devant cette Cour, et en conséquence déboute le demandeur de son action et le condamne à tous les dépens du litige et de l'expertise, distraits à Mtre. J. N. A. McConville, procureur des défendeurs, sauf les frais déjà adjugés durant le cours de l'instance et ceux des motions rejetées par le présent jugement, et sauf aussi les frais des pièces, lesquels sont mis à la charge de la partie qui les a produites.

" La Cour adjuge de plus que le montant des émoluments, frais et déboursés de l'expert devra être taxé régulièrement avant de pouvoir entrer en taxe."

On the 9th March, 1889, the above judgment was reversed by the Court of Review (JETTÉ, MATHIEU, LORANGER, JJ.), as follows :—

" La Cour, après avoir entendu la plaidoirie contradictoire des avocats des parties sur la demande de révision du jugement rendu en cette cause, le 16 février 1888 par la Cour Supérieure siégeant dans et pour le district de Joliette, renvoyant l'action du demandeur ; avoir pris connaissance des écritures des dites parties, des pièces et de la preuve, ainsi que du rapport de l'expert nommé par la Cour de première instance, et sur le tout délibéré ;

" Attendu que le demandeur se pourvoit contre les dé-

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fendeurs pour les faire condamner: 1o. à démolir une digue par eux construite dans la rivière Noire pour l'usage d'un moulin leur appartenant, et 2o. à lui payer une somme de $500 de dommages qu'il soutient avoir soufferts par la crue des eaux produite par cette digue et leur refoulement sur partie des terres possédées par le dit demandeur, dans la paroisse de St-Jean de Matha, sur la dite rivière Noire ;

" Attendu que les défendeurs contestent cette demande ;

1o. Niant les dommages, la responsabilité qu'on leur impute, et même le droit du demandeur à la propriété des terrains décrits en sa demande ;

2o. Soutenant qu'ils avaient droit, eux, les dits défendeurs, comme propriétaires riverains, de construire cette digue et que d'ailleurs, ils ont acquis du Seigneur qui a concédé ces terrains, une servitude pour le refoulement de l'eau sur les terres du demandeur décrite en troisième et quatrième lieu dans sa déclaration, mais que cependant, comme à la suite d'une expertise informe, il a été trouvé que les dommages causés s'élevaient à $12, ils offrent cette somme ;

3o. Enfin, réaffirmant leur droit de construire cette digue indépendamment de toute convention, et répétant ensuite l'allégation de leur droit de servitude sur ces terrains, ils allèguent qu'au mépris de ce droit le demandeur et un nommé Lessard ont, en 1881, creusé la dite rivière Noire pour détruire leur pouvoir d'eau, et leur ont ainsi fait des dommages au chiffre de $1,000, ce qui compense et au-delà ceux réclamés ;

Concluant sur le tout à une nouvelle expertise s'il y a lieu, et dans tous les cas à la compensation des dommages réclamés par le demandeur par ceux qu'ils ont soufferts, et au renvoi de l'action ;

" Attendu en droit :

Que les défendeurs sont mal fondés à prétendre à la servitude qu'ils allèguent avoir acquise du seigneur sur le terrain du demandeur pour les fins de la construction de leur digue, ce droit, s'il a existé, ayant été abrogé par la suppression des droits seigneuriaux ;

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Que néanmoins les défendeurs étaient fondés, comme propriétaires riverains, à construire une digue dans la dite rivière Noire, pour l'exploitation du moulin par eux construit, mais sous la réserve d'indemnité pour les dommages causés par la crue des eaux, le chapitre 51 des Statuts refondus du Bas-Canada couvrant le cas soumis, et la disposition de ce statut s'appliquant aux rivières flottables aussi bien qu'à celles qui ne le sont pas ;

" Attendu en fait :

Qu'il est établi en preuve et spécialement par le rapport de l'expert Beaudry qu'une des terres du demandeur, savoir, la terre No. 585 de la paroisse de St-Jean de Matha, a souffert et souffre de l'eau refoulée par la digue ainsi construite par les défendeurs, et que onze arpents et demi de la dite terre se trouvent hors d'état de culture par le fait de l'eau qui y séjourne, et que la valeur de ces dommages pour la période écoulée depuis la construction de cette digue jusqu'à celle de l'institution de l'action, 13 février 1884, même en prenant en considération la plus value annuelle, alléguée avoir été donnée à la terre du demandeur par la construction du moulin des défendeurs, est de $101.45 ;

" Attendu que les défendeurs n'ont pas prouvé les prétendus dommages par eux soufferts et qu'ils offrent en compensation ;

" Attendu en conséquence que la demande est fondée jusqu'à concurrence de la dite somme de $101.45, et qu'il y a erreur dans le jugement qui l'a renvoyée ;

" Casse et annule le dit jugement, et procédant à rendre celui que la Cour de première instance aurait dû rendre ;

" Renvoie pour autant les défenses des défendeurs et les condamne à payer au demandeur la dite somme de $101.45 avec intérêt du 16 février 1884, jour de l'assignation, et les dépens ; et réserve au demandeur tout recours que de droit pour les dommages qu'il a pu souffrir depuis sa demande susdite ;

" Et la Cour déclare qu'à défaut de paiement du montant des dommages susdits, avec intérêt et dépens, dans les six mois du prononcé du présent jugement, les défen-

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deurs seront tenus de démolir sans délai la digue par eux construite sur la dite rivière Noire, et faute par eux de ce faire dans un délai de quinze jours après ces six mois écoulés, permet au demandeur de procéder lui-même à cette démolition, aux frais et dépens des dits défendeurs ;

" Et condamne les défendeurs aux dépens tant de la Cour de première instance que de cette Cour, distraits à Maîtres Leblanc & Boisvert, avocats du demandeur."

The case was twice submitted to the Court of Appeal. On the 20th May, 1891, it was submitted on the factums before Dorion, C. J., Baby, Bossé and Doherty, JJ. The *délibéré* having been discharged in consequence of the death of Dorion, C. J, the case was re-heard, Sept. 22, 1891, before the Court constituted as stated at the head of the present report.

Choquet, for the appellants :—

Les appelants avaient-ils le droit de faire une chaussée, construire un moulin et l'exploiter, et même faire refouler l'eau et causer des dommages ?

Il ne peut y avoir l'ombre d'un doute. Le chapitre 51 des Statuts Refondus du Bas-Canada leur donne incontestablement ce droit. Cette loi statutaire a établi un droit qui n'existait pas jusqu'alors, et permet à tout propriétaire d'utiliser et exploiter tout cours d'eau qui borde, longe ou traverse sa propriété, en y construisant des usines et manufactures et machines de toutes espèces, et pour cette fin, d'y faire et pratiquer des canaux, chaussées, digues, etc., sauf à payer tous dommages qui pourraient en résulter, soit par la trop grande élévation des digues ou écluses ou autrement, ces dommages devant être constatés par experts qui doivent être nommés par les parties, et à défaut de l'une des parties de le faire, par le préfet du comté, et ce n'est que sur défaut du paiement des dommages fixés par les experts dans les six mois de la date de leur rapport, que la partie lésée peut demander la démolition des travaux.

Voilà la loi et la seule qui régit la présente cause.

En face de cette loi, l'intimé a demandé par son action la démolition de la chaussée des appelants, comme droit

absolu, sans lui donner l'option de payer les dommages, s'il y en avait. Avait-il ce droit? Evidemment non; et sur ce chef l'action est mal intentée.

L'intimé pouvait-il comme il l'a fait, poursuivre les appelants en dommages purement et simplement sans auparavant faire constater ces dommages par experts? Certainement non. La loi que nous venons de citer ordonne de constater ces dommages par experts, et ce n'est que sur le refus de procéder volontairement par expertise, que l'intimé aurait pu intenter son action.

Loin de se refuser à l'expertise, les appelants, avant l'institution de l'action se sont toujours déclarés prêts à se soumettre à la décision d'experts, et ont même requis et mis l'intimé en demeure de nommer son expert et de se conformer à la loi, mais il a refusé et a préféré intenter un procès ruineux; et qui a occasionné des frais qui s'élèvent maintenant à plus de $2,000.

Cette loi a été passée pour empêcher des procès ruineux dans le genre de celui qui nous occupe; car autrement un propriétaire de moulin pourrait être poursuivi sans avis préalable, par vingt individus qui prétendraient avoir droit à des dommages qu'il peut difficilement constater lui-même, et il serait alors exposé à subir les frais de vingt expertises, et de voir autant d'ingénieurs se promener pendant deux ans, sur les bords du cours d'eau pour constater des dommages de quelques piastres et charger ensuite $1,500 pour leur travail; ce serait une injustice criante, et c'est pour empêcher toutes ces injustices et prévenir tous ces abus que cette restriction a été imposée dans la loi que nous venons de citer.

L'action de l'intimé aurait donc dû être déboutée, mais comme les appelants avaient fait des offres, avant l'action et les avaient consignées, l'hon. juge Taschereau a cru devoir les déclarer valables et compenser le montant offert par le peu de dommages que l'intimé avait pu souffrir, et comme nous n'avons pas appelé de ce jugement, il doit être confirmé, tout en déboutant l'action pour les motifs susmentionnés.

La Cour de Révision a nié à l'intimé le droit de de-

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mander la démolition de la chaussée des appelants, mais les a condamnés à payer $101.45 de dommages, et à défaut de paiement a ordonné la démolition de la chaussée.

Nous soumettons que la Cour a jugé *ultra petita* et n'avait pas le pouvoir d'accorder des conclusions qui n'étaient pas demandées.

L'intimé a demandé par ses conclusions le paiement de $500 de dommages, sans demander la démolition à défaut de paiement. La Cour pouvait-elle accorder ce droit de démolition à défaut de paiement, lorsqu'il n'était pas demandé ? Nous soumettons humblement que non ; et cette partie du jugement de la Cour de Révision doit certainement être réformée. Les conclusions de la déclaration contiennent deux chefs bien précis et bien distincts : 1o. demande de démolir la chaussée, et 2o. demande de $500 de dommages, et pas autre chose ; la Cour n'avait pas le pouvoir d'accorder plus, ni même modifier sa demande en lui accordant un droit nouveau qu'il n'entendait pas exercer.

Leblanc for the respondent :—

La contestation liée peut se résumer dans les questions suivantes :

1o. La rivière Noire tombe-t-elle dans le domaine public ?

2o. Si oui, les appelants peuvent-ils se prétendre propriétaires du pouvoir d'eau de la rivière Noire ?

3o. Ont-ils sur les terrains de l'intimé un droit de servitude qui leur donne le droit de faire inonder ses terrains ?

4o. L'intimé a-t-il droit d'action directe pour poursuivre la démolition de la chaussée, si cette dernière lui cause du dommage ?

5o. La chaussée cause-t-elle du dommage à l'intimé et combien ?

6o. Le juge de première instance avait-il le droit de demander à l'expert de constater si la chaussée avait donné une plus value aux terrains de l'intimé, alors que ce fait n'était pas plaidé par les appelants, et, si oui, cette plus value pouvait-elle être opposée par la Cour, en com-

pensation des dommages causés par la chaussée, et quelle est cette plus value.

1. La rivière Noire tombe-t-elle dans le domaine public ?

Si c'est une rivière flottable, d'après l'article 400 du Code Civil elle tombe dans le domaine public. Or je ne citerai que le témoignage du défendeur McConville lui-même. Il dit : " La rivière Noire est une rivière flottable."

2. Si oui, les appelants peuvent-ils se prétendre propriétaires du pouvoir d'eau de la rivière Noire ?

L'article 400 du Code Civil dit que non. La Cour seigneuriale a jugé que même les seigneurs n'étaient pas propriétaires des cours d'eau navigables et flottables. Cette question a aussi été jugée dans la cause de *Boissonnault & Oliva*, Stuart's Rep., p. 564.

3. Ont-ils, sur les terrains de l'intimé, un droit de servitude qui leur permet de faire inonder ses terrains ?

Non. Les seigneurs, en Bas-Canada, tenaient leur droits du roi. C'est ce qui ressort clairement de l'Ordonnance du 6 juillet 1711, (voir Edits et Ordonnances, vol. 1, page 324).

C'est d'ailleurs ce qui a été jugé par la Cour seigneuriale, le 11 mars 1856, (vol. A, page 81a, 39ème question). Le jugement se lit comme suit :

" L'obligation de concéder à titre de redevances, im-
" posée aux seigneurs, doit s'entendre comme étant *exclu-*
" *sive de toutes réserves* qu'on ne peut comprendre sous ce
" terme de redevances, et qui n'étaient pas autrement
" rendu légales."

Voir aussi Question Seigneuriale, vol. B, page 75h, juge Meredith ; vol. A, pages 271 et 272, juge Lafontaine ; vol. B, page 3 g, juge Mondelet.

Maintenant, il est évident que les réserves faites dans le titre de succession produit en cette cause ne sont pas des redevances.

En effet, dans le contrat en premier lieu allégué par les appelants, on voit la réserve suivante :

" Et si la dite seigneuresse, ses hoirs et ayant cause,
" veulent bâtir des moulins, tant à eau qu'à vent, ils se
" réservent pour la construction d'iceux, de prendre pour

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" telle construction, jusqu'à concurrence de six arpents en " superficie, occuper et couper la dite terre pour faire pas- " ser les eaux en tel lieu, etc."

Dans le contrat en 2e lieu allégué par les appelants, il y a la réserve suivante : " la dite dame venderesse se ré- " serve le droit de vendre les pouvoirs d'eau aux environs, " et, en ce cas, le droit de faire hausser les eaux du lac de " deux pieds dans le temps des eaux les plus basses, sans " que le dit acquéreur puisse exiger aucun dommage."

Or, le jugement de la Cour seigneuriale a décidé que ces réserves étaient illégales, et que même les seigneurs n'avaient droit à aucune indemnité pour l'abolition de ces réserves.

Mais les appelants vont peut-être faire l'objection suivante :

Tout ce que vous venez de dire, ne peut s'appliquer qu'aux réserves faites dans le contrat qui a précédé l'abolition de la tenure seigneuriale, c'est-à-dire celui du 2 mai 1853 ; quant à celui du 9 septembre 1857, le seigneur qui possédait alors comme franc tenancier, pouvait imposer les réserves qu'il lui plaisait.

Si cette objection pouvait valoir, il faudrait dire que l'acte qui a aboli la tenure seigneuriale a eu pour effet : 1o. de rendre légales les réserves qui étaient illégales auparavant ; 2o. que tel acte qui voulait abolir telles réserves faites dans le passé, aurait permis en même temps qu'elles existassent dans l'avenir.

Telle n'a pas dû être l'intention du législateur.

D'ailleurs la section 32, ch. 41, S. R. B. C., répond formellement : " Mais toute personne dont le titre avant la " passation de l'acte seigneurial de 1854, l'aurait autorisée " à concéder les dites terres non-concédées, pourra les " *vendre pour telle rente constituée* comme susdit, et *non au-* " *trement*."

2o. Telle servitude, si jamais le seigneur a pu l'imposer légalement, a été abolie par le ch. 41, S. R. B. C.

Le chapitre 41 des S. R. B. C. commence comme suit : " Considérant qu'il est expédient d'abolir tous droits et

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" devoirs féodaux, soit qu'ils portent sur le censitaire, " ou sur le seigneur, etc."

La section 7 dit: " Il sera du devoir de chacun des dits " commissaires d'évaluer les divers droits ci-dessous men- " tionnés, etc."

" 4o. La valeur annuelle des cens et rentes, et autres droits fixes *et de toutes les autres charges légales* auxquelles le fonds est assujéti, etc."

Il faut donc conclure que quand même ces charges auraient été légales, elles ont été abolies, et le seigneur en aurait été indemnisé.

4o. L'intimé avait-il droit d'action directe pour poursuivre les appelants en dommages, et pour demander la démolition de leur chaussée ?

Cette question a été jugée affirmativement par la Cour de Révision, dans la cause de *Jean* v. *Gauthier*, 5 L. C. R. 138. Voici comment ce jugement a été rendu:

" Que le mode nouveau et spécial donné par le statut " pour constater et déterminer le montant de l'indemnité, " n'a pas ôté ceux du droit commun qui ne pouvaient être " abrogés que par une disposition expresse."

La même chose a été décidée dans la cause de *Emond* v. *Gauthier*, 3 Q. L. R. 360.

Enfin, dans la présente cause, la Cour Supérieure, ainsi que la Cour de Révision, ont adopté le même point de vue. Le juge Polette, dans la cause de *Béliveau* v. *Levasseur*, 1 R. L. 720, a traité cette question à fond.

Les appelants prétendent qu'ils tombent sous le coup du ch. 51, des S. R. B. C. Or tel n'est pas le cas. En effet, le ch. 51 ne s'applique qu'aux rivières non navigables ni flottables. C'est ce qui ressort clairement de l'art. 503 du Code Civil.

Si le ch. 51 s'appliquait aux rivières navigables et flottables, l'art. 503 du Code Civil serait contradictoire. En effet, l'art. 503 commence par dire: Celui dont l'héritage borne une eau courante *ne faisant pas partie du domaine public* peut s'en servir à son passage, mais de manière à ne pas empêcher l'exercice du même droit par d'autres; cependant, s'il veut construire des moulins, usines, etc., il

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peut arrêter le cours de l'eau, construire des écluses, faire inonder des terrains, etc., en payant les dommages.

L'exception posée dans l'art. 503, s'applique aux rivières non navigables ni flottables.

S'il fallait interpréter ce statut comme s'appliquant aux rivières navigables et flottables, c'est-à-dire à des dépendances du domaine public, ce serait dire qu'un statut pourrait permettre à un individu de s'emparer d'une rue ou d'un chemin public pour sa propre utilité. C'est un principe de droit reconnu par les auteurs que les dépendances du domaine public sont inaliénables tant qu'elles en font partie.

Or, dans le cas actuel, les appelants n'ont pas même obtenu de l'autorité compétente, le droit de construire leur chaussée sur la rivière Noire.

5. La chaussée cause-t-elle du dommage à l'intimé et combien ?

A vrai dire, c'est là toute la cause, et c'est sur cette seule question réellement que cette cause a été portée en appel.

Nous ne pensons pas que cette Cour renversera le jugement de la Cour Inférieure sur une question de fait.

6. La Cour de première instance avait-elle le droit de demander à l'expert de constater si la chaussée avait donnée une plus value aux terrains de l'intimé, alors que ce fait n'était pas plaidé par les appelants, et si oui, cette plus value peut-elle être prise en compensation par la Cour, des dommages causés par la chaussée, et quelle est cette plus value ?

Cette question de plus value n'est pas plaidée par les appelants. C'est la Cour de première instance seule, qui avant de juger au mérite, a pour ainsi dire plaidé ce point pour les appelants. L'intimé a excipé de ce jugement. En jugeant au mérite, si la Cour prend ce point en considération, elle jugera *ultra petita* en faveur des appelants.

Nov. 26, 1891.]

LACOSTE, Ch. J. :—

Appel d'un jugement de la Cour de Révision renversant le jugement de la Cour de première instance qui avait

débouté l'action, et condamné les défendeurs appelants à payer $101.45, et à défaut de paiement à la démolition de la digue construite par les appelants sur la rivière Noire.

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L'intimé est propriétaire de terres aboutissant au lac noir. Ce lac se décharge dans la rivière Noire. En 1881 les appelants ont fait construire une digue dans la rivière Noire, pour faire marcher un moulin à scie. La chaussée a élevé le niveau des eaux du lac, et a fait submerger une partie des terres de l'intimé. Ce dernier a pris contre l'appelant en février 1884, une action en démolition de la chaussée et pour $500 de dommages soufferts à la date de l'action.

Les appelants ont prétendu qu'ils avaient un droit de servitude sur les terres ou quelques-unes des terres de l'intimé, qui les autorisait à faire refouler l'eau sans paiement d'indemnité ; ils ont invoqué le chapitre 51 des Statuts Refondus du Bas-Canada, lequel autorise tout propriétaire riverain à utiliser les eaux qui bordent sa propriété, sauf à indemniser les propriétaires supérieurs des dommages qu'ils subissent.

L'hon. juge Cimon s'est déclaré contre les appelants sur la question de servitude, a reconnu leur droit de construire la digue sous l'autorité du ch. 51 du Statut Refondu et, vu la preuve contradictoire qui avait été faite, a ordonné une expertise pour établir le montant des dommages.

L'expert choisi par les parties a en résumé trouvé que l'intimé avait souffert $40 de dommages par année soit $101.45 pour le temps qui s'est écoulé depuis la construction de la chaussée jusqu'à l'action.

L'hon. juge Taschereau n'a pas accepté les conclusions de l'expert, il a estimé les dommages à un montant de quelques piastres, qu'il a déclaré compensés par la plus value donnée aux propriétés de l'intimé, par l'établissement du moulin à scie.

La Cour de Révision a adopté les vues de l'expert et a accordé le montant établi par lui $40 par année, soit $101.45.

L'appel n'est que sur cette dernière question, les appe-

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lants demandent à cette Cour de confirmer le jugement de la Cour de première instance, et les motifs de ce jugement.

Sur ce point nous adoptons l'opinion de la Cour de Révision, nous croyons que l'opinion à laquelle en est arrivé l'expert Beaudry, est justifiée par la preuve.

Seulement en admettant en compensation des dommages la plus value allouée par l'expert, à raison de la construction du moulin à scie des appelants, la Cour de Révision n'aurait dû condamner les appelants qu'à $31.75 par année, soit environ $80 en tout.

Cette Cour ne croit pas cependant devoir modifier le jugement parce qu'elle est d'opinion, que d'après la preuve, le moulin n'a donné aucune plus value à la propriété de l'intimé qui puisse être offerte en compensation.

Cette plus value serait due à la facilité qu'offre le moulin des appelants à l'intimé pour le sciage de son bois.

Cet avantage est très problématique, car l'intimé peut désirer garder sa terre en bois, et ne pas la défricher. Ensuite il a un autre moulin à scie à 10 arpents de sa propriété, tandis que le moulin des défendeurs est à trois milles.

Les appelants prétendent que la Cour de Révision a adjugé *ultra petita* en condamnant les appelants à la démolition de la digue faute de paiement des dommages.

Nous croyons que les conclusions de la demande justifient un tel jugement. La démolition de la chaussée est demandée, la Cour accorde la demande, mais en la restreignant.

BOSSÉ, J., considered the estimate of damages too high, but did not think it necessary, on a mere question of evidence, to enter a formal dissent.

The judgment is as follows :—

" La Cour, etc.....

" Considérant qu'il n'y a pas mal jugé dans le jugement rendu par la Cour Supérieure siégeant en révision à Montréal le 9 de mars 1889, sauf en ce qui concerne la plus value annuelle alléguée avoir été donnée à la terre

de l'intimé par la construction du moulin des appelants, laquelle plus value a été prise en considération erronément par la Cour de Révision attendu qu'il n'y a pas eu telle plus value;

"Confirme le dit jugement à tous autres égards, avec dépens contre les appelants en faveur du dit intimé."

Judgment confirmed.

Mercier, Beausoleil, Choquet & Martineau for appellants.
Leblanc & Boisvert for respondent.

(J. K.)

June 25, 1891.

Coram DORION, C. J., BABY, BOSSÉ, DOHERTY, CIMON, JJ.

ACCIDENT INSURANCE CO. OF N. A.,
(*Defendants in Court below*),
APPELLANTS;

AND

DUNCAN McFEE ET AL.,
(*Plaintiffs in Court below*),
RESPONDENTS.

Accident insurance—Risk incidental to employment—Breach of contract.

M., who was described in the application for insurance as "Superintendent of the International Railway," was insured by the company appellant, against accidents. By one of the conditions of the policy it was stipulated as follows:—"The insured must at all times observe due diligence for personal safety and protection, and in no case will this insurance be held to cover either death or injuries occurring from voluntary exposure to unnecessary or obvious danger of any kind, nor death or disablement ... from getting or attempting to get on or off any railway train, etc., while the same is in motion." M., when travelling on the business of his railway, was killed while getting on a train in motion.

HELD:—That inasmuch as M. was insured as superintendent of a railway, and there was evidence that his duties required him to get on and off trains in motion, of which fact the insurers had knowledge, the condition did not apply, and the company was liable.

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APPEAL from a judgment of the Superior Court, St. Francis (BROOKS, J.), Nov. 30, 1889, as follows:—

"The Court, etc.....

"Considering that plaintiffs have established that they are the legal representatives of the late Donald E. McFee; that said Donald E. McFee had been, for many years prior to his death, insured against accidents with defendants for the sum of $5,000, to wit, since the month of March, 1877;

"That in renewal of the policy theretofore issued to said late Donald E. McFee, to wit, on the 21st day of July 1886, the defendants did, upon the application of said late Donald E. McFee, issue and deliver to said late Donald E. McFee the policy set up in plaintiffs' declaration, as plaintiffs' exhibit No. 1, whereby defendants insured said late Donald E. McFee against injury from accidents, either disabling him from the performance of his usual business, or causing death within ninety days from such accident; said policy having been granted him as Superintendent of the International Railway, which insurance was continued for the subsequent year on payment of the premium;

"That on the 15th day of December, 1887, at Sherbrooke, in said district, the said late Donald E. McFee received injuries to his person, resulting from violence, accidentally occasioned, and of which there were external and visible signs, and from which injuries he did instantly die;

"And considering that said accident and injuries so received by said insured were incident to the occupation of said late Donald E. McFee as Superintendent of the International Railway, and were covered by the policy issued to and in his favor, and that defendants received due proof of the death as aforesaid of said late Donald E. McFee;

"And considering further that defendants have failed to establish the material allegations of their pleas filed in this cause, and particularly that said late Donald E. McFee on the 15th day of December, 1887, voluntarily

exposed himself to unnecessary and obvious danger, or that the condition as to getting on or off a train or other conveyance using steam as a motive power, while the same was in motion, applied to said late Donald E. McFee, the occupation of said late Donald E. McFee requiring him so to do in the performance of his duties as a Superintendent of said International Railway, and so known to defendants and their officers, doth dismiss the pleas of said defendants, and doth adjudge and condemn defendants to pay to plaintiffs the sum of $5,000, with interest thereon from the 20th day of March, 1888, and costs of suit, *distraits*, etc."

The action was brought by the legal representatives of one Donald E. McFee, deceased, for some years Superintendent of the International Railway, to recover the amount of an "accident" insurance policy.

The International Railway, now forming part of the Canadian Pacific "Short" Line, had then one terminus in the City of Sherbrooke, and the other at Lake Megantic, a distance of about 70 miles.

From Sherbrooke to Lennoxville the trains of the International Company ran over the Grand Trunk line, a distance of three miles; and the railway offices in the Sherbrooke station were used jointly by the two companies. The employees at this station were employed in common.

On the 14th December, 1887, the deceased, Donald E. McFee, went from Lennoxville, where he lived, by G. T. R. train to Montreal on the business of his railway. He returned by a train arriving at Sherbrooke at about half-past seven in the evening of the 15th. Here deceased got off the train and went into the office to look at the books of the International Railway Company, as on such occasions he was in the habit of doing. While there, the train started, and deceased hurried out of the office to get on board, but in doing so slipped and fell under the wheels and was instantly killed.

To an action by the representatives of deceased, the defendants pleaded that in his application for insurance

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deceased described himself as Superintendent of the International Railway Company, and that this class of risk was "preferred," and deceased accepted the contract subject to the conditions endorsed upon the policy; that in and by one of the conditions it was stipulated as follows:

"The insured must at all times observe due diligence for "personal safety and protection, and in no case will this "insurance be held to cover either death or injuries oc- "curring from voluntary exposure to unnecessary or ob- "vious danger of any kind (unless to save human life), nor "death or disablement from injuries received in violating, "or in consequence of having violated the rules or by- "laws of any company, corporation—municipal or com- "mercial—or firm; nor from getting or attempting to get "on or off any railway train or other conveyance using "steam as a motive power, while the same is in motion," etc.

That deceased did expose himself to unnecessary and obvious danger, and met his death while attempting to board a train in motion; and therein also was violating a by-law of the Grand Trunk Railway Company.

That in consequence plaintiffs have no action against defendants under the policy.

A special answer was filed to this plea, alleging that deceased met his death while in the discharge of his duties as Superintendent of the International Railway, which duties required him constantly to get on and off trains while in motion, as was well known to defendants and their officers.

That the condition does not apply to railway employees, and all former policies issued by defendants contained this exception, and although no exception appears on the policy issued to deceased in July, 1886, his attention was not drawn to any change, and no change was known to exist.

That whether expressed or not, the condition cannot apply in a case where the risk is necessarily incident to the occupation insured against.

That even if the condition did apply to deceased, yet

the policy would not be wholly void, but merely reducible to an amount proportionate to the premium paid in a higher class.

May 21, 22, 1891.]

Béique, Q.C., and *S. Cross* for the appellants :—

The plaintiffs have directed their efforts strenuously towards attempting to prove that the condition of the policy was not intended to, and did not apply to the deceased. In this they have failed. They examined a number of witnesses to prove what the duties of the late Mr. McFee were as Superintendent of the International Railway, and that it was necessary for him in the course of these duties to get on and off trains in motion, and that in their opinion the policy of insurance, if this condition was valid, would have been useless to him. The opinions of these persons are unimportant as they cannot affect the merits of the contract upon which the plaintiffs base their claim. Mr. McFee was insured under the class "preferred," that is, the class least liable to accident, and for which the lowest premium payable was paid. It was not to be supposed that because he was styled in the policy "Superintendent, International Railway" that he would expose himself to risks, not only not contemplated, but actually prohibited by the terms of the policy; nor would it be just to hold the defendants liable for a risk they never undertook and for which they received no consideration.

The only contract which existed between the insured at the time of his death, and the defendants, and upon which the plaintiffs have brought this action, is that contained in his application for the policy sued upon, and in the policy itself. In the application signed by Mr. McFee he specially agreed to be bound by the conditions of the policy applied for, and the policy was issued upon that application and agreement.

One of the *considérants* of the judgment complained of is that the defendants failed to prove "that the condition "as to getting on or off a train or other conveyance using "steam as a motive power while the same was in motion,

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"applied to the said late Donald E. McFee." The contract upon which the action is based contains the condition. It was for the plaintiffs to prove that it did not apply or had been waived in favour of the deceased, and in this they have wholly failed.

The appellants referred to *Neill* v. *Travellers Ins. Co.*, 12 Can. S. C. R. 55.

H. B. Brown, Q.C., for the respondents :—

The plea claims the voidance of the contract on three grounds :

1. Voluntary exposure to unnecessary and obvious danger.

2. Breach of the condition against getting on or off a train while in motion.

3. Breach of a by-law of the G. T. R. Co. in so doing.

The doctrine of contributory negligence is not applicable in an action upon a contract of insurance against accident. Protection against loss or injury from negligence is one of the motives which induce assurance against accident, as well as against fire. A large proportion of those events which are universally called accidents, happen through some carelessness of the party injured. Yet, such injuries having been unexpected, and not caused intentionally, or by design, are always called accidents. May on Insurance, 2nd Ed., No. 530, 408, 409, 410. Ordinary negligence will not vitiate a policy which stipulates that the company will not be liable for wilful and wanton exposure to unnecessary danger.

The next point pleaded is the express condition against getting on or off a train while in motion.

It is not denied that the accident falls within this condition, if it be applicable to deceased.

Deceased had been insured in the company for some years ; he had held policies varying slightly in form. Two of these are produced wherein this condition is excepted in cases of railway employees employed at the time as such.

It was the practice of the company where the insured

had carried insurance for five years without making a claim, to give him the sixth year's insurance free, and the policy issued to deceased in July, 1886, was one of these "*bonus*" policies.

It has written on it in red—the letter "R," to signify that it was a renewal, and that there was no change in the risk.

This policy does not expressly contain any exception in favor of railway employees.

The attention of deceased was not, however, drawn to any change in the policy, nor were the agents of appellants in Sherbrooke aware that there was any change.

These policies are not issued with the formality of ordinary life policies. They are issued in quantities to the agents, and dealt out to the public like railway tickets.

In July, 1887, when deceased paid for his re-insurance, a renewal receipt merely was given to him.

The agent Lyford, says that if he had asked for a new policy, there would have been no objection, and deceased would have received a policy in the form of exhibit C, produced by respondents, the form then in use by the company.

In this form there is an express exception in favor of railway employees.

But the appellants claim that a superintendent of a railway is not an employee whose duties make it necessary for him to get on and off trains while in motion; and that for this reason they are insured in the "preferred" class, while conductors are insured in the "ordinary" class. The rate of premium being higher in the "ordinary" than in the "preferred" class, to meet this and other extra risks.

There is no evidence produced as to what the duties of railway superintendents generally may be, nor whether they are required to get on and off trains while in motion. Appellants content themselves with showing that superintendents and conductors go into different classes, *a quo* they argue that the exception in favor of railway employees applies in the one case and not in the other.

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In the condition as expressed on the policies, and especially the form C, the exception is made to apply to railway employees generally. Moreover, we specially answer that deceased was not insured as a railway superintendent, but as "Superintendent of the International Railway."

It is proved that his duties did require him to get on and off trains in motion, and that this was well known to the officers of the company in Sherbrooke, who took his applications and gave him his policies.

June 25, 1891.]

The COURT unanimously dismissed the appeal.

Judgment confirmed.

Hatton & McLennan, and *S. Cross* for appellants.

Ives, Brown & French for respondents.

(J. K.)

March 26, 1891.

Coram DORION, C. J., CROSS, BABY, BOSSÉ, DOHERTY, JJ

HON. ARTHUR TURCOTTE, ÈS-QUAL.,
(*Intervenant in Court below*),
APPELLANT;

AND

FRÉDERIC L. BÉIQUE, ET AL.,
(*Respondents in Court below*),

AND

JOHN P. WHELAN,
(*Petitioner in Court below*),
RESPONDENT.

Constitutional law—Executive power—Commission of inquiry —R. S. Q. 596, 598—*Prohibition, Writ of.*

HELD:—Reversing the judgment of WURTELE, J., M. L. R., 6 S. C. 289, 1. An inquiry into an alleged attempt to influence and corrupt members of the provincial legislature is a matter connected with the good government of the province, and the conduct of the public business therein, within the meaning of R. S. Q. 596.

2. A commission of inquiry issued by the Lieutenant-Governor-in-Council under the said section, has the same power to enforce the attendance of witnesses, and to compel them to give evidence before it, as is vested in any Court of law in civil cases, and has therefore the power to punish by fine or imprisonment, or both, any contempt of its authority by any person summoned as a witness refusing to appear, or to answer questions put to him concerning the matters which are the subject of such inquiry.

3. Under the provisions of the B. N. A. Act, 1867, the provincial legislature was empowered to enact the provisions contained in Articles 596 and 598 of the Revised Statutes of Quebec.

4. Even if the commissioners, in the course of the inquiry which they were duly authorized to make, had permitted some irregular or illegal questions to be put to a witness, their improper ruling on the subject could not have authorized the issue of a writ of prohibition, which only applies to cases of want of jurisdiction, and not to cases of erroneous judgments, for which other remedies are provided.

APPEAL from a judgment of the Superior Court, Mon-

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treal (WURTELE, J.), July 25, 1890, maintaining a writ of prohibition. The judgment of the Court below is fully reported in M. L. R., 6 S. C. 289—305.

The following is a copy of the Royal Commission issued in the case :—

COMMISSION ROYALE.

CANADA.

PROVINCE DE QUÉBEC.

VICTORIA, par la grâce de Dieu, Reine du Royaume-Uni de la Grande Bretagne et d'Irlande, Défenseur de la Foi, etc., etc., etc. A tous ceux à qui les présentes parviendront ou qu'icelles pourront concerner,

SALUT :

Attendu qu'il a été dit tant par des témoignages assermentés, donnés devant la Cour Supérieure à Montréal, dans une cause entre MM. Whelan et Ford, que dans des déclarations publiées dans des journaux, que Monsieur J. P. Whelan, constructeur du Palais de Justice à Québec, a payé une somme de dix mille piastres ($10,000) pour influencer certains membres de la législature de Québec, en rapport avec le crédit spécial voté à la dernière session pour le règlement de sa réclamation contre le Gouvernement, au sujet de telle construction ; et que ces dires et ces déclarations sont de nature à affecter le bon gouvernement de cette province, la dignité de la législature et l'indépendance de ses membres :

Et attendu qu'il importe de faire faire une enquête complète, entière et impartiale à ce sujet :

A ces causes, en vertu de l'article 596 des Statuts Refondus de la province de Québec, et par et avec l'avis et le consentement du Conseil Exécutif de notre dite province, nous avons commis, constitué et nommé, et par les présentes, commettons, constituons et nommons Frédéric L. Béique, écuier, de la cité de Montréal, un de nos Conseils de la Reine et bâtonnier de la section du barreau du district de Montréal, et Jacques Malouin, écuier, un de nos Conseils de la Reine, de la cité de Québec, commissaires pour conduire et diriger une enquête sur le sujet ci-dessus mentionné.

Et nous autorisons les dits Frédéric L. Béique et Jacques Malouin, en leur dite qualité de commissaires, à assigner devant eux des témoins à leur faire rendre témoignage sous serment par écrit, et à leur faire produire les documents et choses nécessaires pour la parfaite investigation des dites plaintes.

Pour, par les dits Frédéric L. Béique et Jacques Malouin, tenir et exercer la dite charge pour les fins susdites, durant bon plaisir. Et nous leur enjoignons par les présentes de faire rapport de la dite enquête avec toute la diligence convenable.

En foi de quoi, nous avons fait rendre nos présentes Lettres Patentes, et à icelles fait apposer le grand sceau de notre dite province de Québec : Témoin, notre fidèle et bien-aimé, l'honorable Auguste Réal Angers, Lieutenant-Gouverneur de la dite province de Québec, à notre Hôtel du

Gouvernement, en notre cité de Québec, dans notre dite province de Québec, ce vingt-septième jour de mai, dans l'année de Notre Seigneur, mil huit cent quatre-vingt-dix, et de notre règne, la cinquante-troisième.

Par ordre,

JOSEPH BOIVIN
Assistant-secrétaire.

A. R. ANGERS.

Enregistré le 29 mai 1890 In lib. G., vol. 203.

J. C. LANGELIER,
Dép. Rég. Prov.

The following is the petition of the respondent upon which the writ of prohibition issued :—

"To the Honorable the Superior Court or to any of the Honorable Judges thereof sitting in Chambers.

The petition of John Patrick Whelan, of the city and district of Montreal, contractor,

Humbly represents :—

That Frederick L. Béique, of the city and district of Montreal, Queen's Counsel, and James Malouin, of the city of Quebec, Queen's Counsel, acting and claiming to act under certain powers purported to be conferred upon them, by a commission issued by His Honor the Lieutenant-Governor in Council, dated at Quebec, the 27th day May, 1890, did on or about the 6th day of June, instant, summon your petitioner to appear and give evidence before them, acting in their said capacities, on the 10th day of June instant.

That your petitioner did so appear and was questioned by the said Frederick L. Béique and James Malouin, acting in their capacity as aforesaid, touching certain matters relative to the payment of $10,000, given by one John P. Whelan to Ernest Pacaud.

That the powers conferred upon the said Frederick L. Béique and James Malouin, by the said commission, were expressly limited to enquiring into certain allegations, that a sum of $10,000 had been by one John P. Whelan, paid to one Ernest Pacaud for the influencing members of the legislature of the province of Quebec, as appears by a copy of the said commission herewith produced to form part hereof.

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That your petitioner, without recognizing any right or power in said Béique and Malouin, to compel him to attend or give evidence before them, did attend before said Béique and Malouin, and did answer any questions which were put to him and which had any bearing upon any matter which the said commissioners were under their said commission, instructed or empowered to enquire into.

That the said commissioners further proceeded to put to your petitioner, a question whereby they requested him to give the name of the person who had advised him to pay the sum of $10,000 to the said Ernest Pacaud.

That your petitioner believing and being advised that the said question was not pertinent to the matters which said commissioners under their commission, were empowered to enquire into, and that the same tended to elicit from him information of a private and confidential nature and which he was not, by law, bound to give, refused to answer said question.

That upon the refusal by your petitioner, the said commissioners adjourned his examination until half past ten in the forenoon of the 11th of June instant, at the same time notifying your petitioner that should he at their next sitting on the said 11th day of June, persist in his refusal to answer the said question, that they, said commissioners, would commit him to the common gaol of this district for contempt.

That by law the commissioners have no power or jurisdiction to so commit your petitioner, and in so doing would exceed any jurisdiction which they can claim to exercise under the said commission above recited.

That prior to the putting of the said question, your petitioner, as it appears by his deposition taken before the said commissioners, expressly swore that he did not pay any money for the purpose of influencing any members of the legislature.

That in putting to him the question which he objected to answer, the said commissioners were going beyond any power which they could claim to exercise under the said

commission, in proceeding to investigate matters having no bearing upon the questions which they were so charged to enquire into.

That in proceeding to commit your petitioner for refusal to answer the said question, the said commissioners are about to act beyond their jurisdiction and power, and exceeding any jurisdiction which they might claim to exercise under and in virtue of the commission above recited.

That the said commission was issued for the purpose of enquiring into matters not coming within the category of subjects set forth in section number 596 of the Revised Statutes of the province of Quebec, under which section the said commission purports to have been issued.

That the commissioners named by the said commission have no power or jurisdiction to commit any person for contempt by reason of the refusal of said person to answer any question put by the said commissioners.

That in so far as section number 598 of the said Revised Statutes purports to give such power to any commissioner or commissioners named under said section 596, said section number 598 is *ultra vires* of the legislature of the province of Quebec.

That furthermore, the question put to your petitioner, and for refusing to answer which he is threatened with imprisonment as aforesaid, was not and is not pertinent to the matters which the said commission was charged to investigate.

That by reason of the premises, the said commissioners have no right, power or jurisdiction to commit your petitioner as threatened by them, and any such committal by them would be illegal and a gross violation of the rights of your petitioner.

Wherefore :—

Your petitioner prays that your Honors do order that a writ of prohibition do issue, addressed to the said commissioners Frederick L. Béique and James Malouin in their said capacity of commissioners under the said commission above recited, prohibiting them from further

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proceeding to commit your petitioner, and that by the judgment to be rendered upon his present petition it be declared that the said commissioners have no power or jurisdiction to so commit your petitioner, and that the said writ of prohibition to be issued may be declared good and valid and maintained.

The respondents Frederic L. Béique and James Malouin duly appeared in the cause and referred themselves to justice; and the hon. Arthur Turcotte in his quality of Attorney-General for the province of Quebec appeared, and upon petition to the Court was allowed to intervene in the cause, and to answer the said petition and contest the writ of prohibition issued at the instance of the petitioner, John P. Whelan, the present respondent.

The following are the intervention and *moyens* filed in the cause by the present appellant:—

"And the said the honorable Arthur Turcotte in his quality of Attorney-General for the province of Quebec, who has been allowed by a judgment of this honorable Court rendered at Montreal, on the 20th day of June instant, to intervene in this cause and to contest the petition filed herein by the said petitioner John P. Whelan and the writ of prohibition issued herein, for answer to and contestation of the petition of the said petitioner John P. Whelan made and filed herein, saith:

That each and all the allegations, matters and things set forth and contained in the said petition, which are not hereinafter expressly admitted to be true, are and each of them is false and untrue and specially denied by the said intervenant *ès-qualité*.

That it is true that the said respondents were duly appointed commissioners under the commission directed to them by the Lieutenant-Governor of the province of Quebec, with the advice and consent of the Executive Council of the said province, which commission is dated the 27th May, 1890, and is herewith produced and filed to form part thereof; the object and scope of the enquiry which the commissioners were appointed to make being fully set forth in the said commission.

That the said petitioner John P. Whelan appeared before the said respondent commissioners, and was sworn, and answered several questions put to him by the said commissioners, and by so doing acknowledged the authority of the said respondents to conduct the enquiry as to them directed under the terms of the said commission.

That the question which the said petitioner John P. Whelan refused to answer, namely: "You have previously referred in your testimony given this day in this matter to a person as having advised or induced you to pay over to Mr. Ernest Pacaud the $10,000 in question, you are requested to name the person who so advised or induced you to pay over the said sum?" was and is relevant and pertinent to the matter which the said commissioners under the said commission were empowered to enquire into, and an answer to the said question was necessary for the proper investigation of the said matter; and if the said question be not answered the object of the said commission will not be attained but will be frustrated and defeated.

That the said question was and is specially pertinent to the said matter to be enquired into, in view of the fact that it was previously sworn to by Ernest Pacaud, a witness examined under the said commission, that he, Pacaud, had received the said sum of $10,000 from the said John P. Whelan on the 6th day of February last at Montreal, and had paid it out again to some person in the city of Quebec on the 7th day of February last, but the name of this person the said Pacaud refused to give, and, from the evidence adduced, there is good ground for believing that the person who advised and induced the said John P. Whelan to pay over said sum of ten thousand dollars to said Pacaud is also the person to whom said Pacaud paid the said sum of money.

That by sub-sections 14 and 15 of section 92 of the British North America Act, 1867, the following subjects are enumerated as being wholly within the power of the provincial legislature, namely, "14. The administration

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of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in these courts." "15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section."

That the said Act, in assigning to the legislature of the province, power to legislate on the said subjects, gives at the same time all the incidental subjects of legislation necessary to the exercise of the power so assigned.

That the legislature of the province of Quebec has, as an incident to these expressed powers under the said British North America Act, the right to summon witnesses and punish persons who disobey such summons, and also all persons who having appeared refuse to answer, this right being necessary to the proper exercise of its powers of legislation, and the control assigned to it in respect to the administration of justice and public affairs.

That by chapter 2 of title 3 of the Revised Statutes of the province of Quebec, the said respondents have full power and jurisdiction to act as directed under the said commission, and to commit the said petitioner to the common gaol of this district, if he persist in refusing to answer the said question put to him by the said commissioners.

That the said writ of prohibition has been issued illegally, and is moreover wholly unfounded and should be quashed and annulled and set aside.

Wherefore the said intervenant in his said quality prays that the said writ of prohibition issued herein be declared to have issued illegally and to be unfounded, and be quashed, annulled and set aside and declared null and of no effect, and also that the order given by His Honor Mr. Justice Wurtele restraining and prohibiting the said commissioners from taking any proceedings whatsoever against the said petitioner for contempt and from enforcing any order for his imprisonment and detention for

contempt, be also annulled and set aside and declared null and of no effect, the whole with costs, including costs of exhibits, *distraits*, etc.

Jan. 20, 1891.]

Hutchinson, for the appellant:—

Under the issues in the case three questions present themselves for adjudication:

1o. Whether the matter to be investigated is contained in the category of subjects mentioned in article 596 of the Revised Statutes of Quebec?

2o. Whether the legislature had the power to enact the article 598 of said Revised Statutes, which purports to confer upon commissioners appointed to conduct enquiries concerning public matters, the same power as is vested in Courts of law in civil cases to enforce the attendance of witnesses and compel them to give evidence?

3o. Whether the question put to the petitioner-respondent was pertinent to the enquiry?

Article 596 reads as follows: "Whenever the Lieute-
" nant-Governor in Council deems it expedient to cause
" enquiry to be made into and concerning any matter
" connected with the good government of the province,
" the conduct of any part of the public business, or the
" administration of justice, and such enquiry is not re-
" gulated by any special statute, he may by a commission
" issued to that effect, confer upon the commissioners by
" whom such enquiry is to be conducted the power of
" summoning before them any witnesses and of requiring
" them to give evidence on oath, orally or in writing, and
" to produce such documents and things as such commis-
" sioners deem requisite to the full investigation of the
" matters in which they are appointed to examine."

Article 598: "The power thus conferred by law or by
" the Lieutenant-Governor in virtue of either of the pre-
" ceding articles, carries with it the same power to en-
" force the attendance of witnesses and to compel them
" to give evidence as is vested in any Court of law in
" civil cases; but no witness is compelled to answer any
" question when his answer might render him liable to
" a criminal prosecution."

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The question arises, is the payment of a large sum of money, in order to influence members of the legislature in the discharge of their legislative duties, of a nature to affect the good government of the province, or the conduct of any part of the public business of the province?

To the ordinary mind, looking at this question from a common sense view, it would certainly appear that it would be difficult to point to any act that would more directly strike at the source of good government, or more seriously interfere with the conduct of public business than the subject matter of this investigation. Without good laws, how can there be good government? And if the members of the legislature who enact the laws and so direct the conduct of public affairs can be tampered with and influenced by pecuniary rewards, how is it possible that laws looking to the well-being of the country can be enacted?

It is evident that it was never the intention of the legislature which framed and enacted this article 596 of the Revised Statutes, giving power to the Lieutenant-Governor in Council to cause an enquiry to be made into and concerning any matter connected with the good government of the province, the conduct of any part of the public business, or the administration of justice, that such enquiry should be limited to matters occurring in, or referring to, some one of the departments of the executive government. The very fact that power is given for the making of an enquiry into the administration of justice shows that it was never intended to limit investigations to matters only within the purview or general management of the executive.

And further, does not the subject matter of this enquiry affect the conduct of part of the public business of the country? The building of the Court House at Quebec was a public matter. The contract between the respondent Whelan and the government was a matter in which the public were interested. The payment of $10,000 by Whelan to influence members of the legislature to vote money on his behalf was evidently either to secure a

vote of money to which he, Whelan, was not entitled, or which he knew he would not otherwise get, so that the object of Whelan was corruptly to get possession of public moneys from the treasury of the province. Assuming that the assertion was true which caused the present enquiry to be made, public money was to be paid under cover of, or in connection with, this public contract. The public moneys were to be paid wrongfully and corruptly in connection with this public matter or business, the building of the Court House.

The subject matter of the enquiry therefore evidently came within the scope of that part of Article 596 which provides for an enquiry into any matter concerning the conduct of any part of the public business of the province.

C. J. Doherty, Q.C., for respondent, sustained the propositions set forth in the judgment of the Court below.

March 26, 1891.]

DORION, Ch. J., rendered the judgment of the majority of the Court, reversing the judgment of the Court below. The reasons are sufficiently stated in the judgment which is as follows:—

"The Court, etc.....

"Considering that Frederic L. Béique and Jacques Malouin were appointed by a commission issued by the Lieutenant-Governor of the province of Quebec in Council on the 27th May, 1890, commissioners under Article 596 of the Revised Statutes of Quebec, to make an enquiry respecting the statement made in the sworn testimony given before the Superior Court at Montreal, in a cause between Whelan and Ford, as well as certain other statements published in the newspapers, that J. P. Whelan, builder of the court house at Quebec, had paid a sum of $10,000 to influence certain members of the legislature of Quebec, in connection with the special credit voted at the then last session, to settle his claim against the government for the erection of said court house;

"And considering that the said respondent John P. Whelan was summoned to appear as a witness before the

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said commissioners, and being sworn, was asked, while under examination as such witness, the following question :—

'Q. You have previously referred, in your testimony 'given this day in this matter, to a person as having 'advised or induced you to pay over to Mr. Ernest Pa- 'caud the $10,000 in question. You are requested to 'name the person who so advised or induced you to pay 'over said sum ;'—to which question he refused to answer, and that he was then informed that his refusal to answer would be held by the commissioners as a contempt for which they would commit him to gaol, if he persisted therein ;

"And considering that the said respondent applied by petition to a judge of the Superior Court, and obtained a writ of prohibition addressed to the said commissioners, prohibiting them from taking any proceedings whatsoever against the said petitioner (the present respondent), or from enforcing any order for his imprisonment or detention for contempt until final adjudication on the said respondent's petition ;

"And considering that the grounds which the respondent urged in his said petition to justify the issue of said writ of prohibition were :

1st. That the matter to be investigated under the commission did not come within the category of subjects mentioned in Art. 596 of the Revised Statutes of Quebec, under which said commission purported to have been issued.

2nd. That even had such matter come within such category of subjects, the legislature had no power to enact section 598 of said Revised Statutes, giving to commissioners appointed under said section 596, as well as to certain boards and officers mentioned in section 597, the same power as is vested in courts of law in civil cases, to enforce the attendance of witnesses and compel them to give evidence ;

3rd. That even were the two preceding reasons unfounded, the question put to respondent was utterly

irrelevant, and had no bearing on the matters the commissioners were empowered to investigate;

"And considering that on the return of the said writ of prohibition, the two commissioners appeared, and without admitting or contesting the same, declared they submitted the case, in so far as they were concerned, to the decision of the Court (qu'ils s'en rapportaient à justice);

"And considering that the attorney general for the province of Quebec was allowed to intervene in the case, and to contest the petition of the respondent, and the writ of prohibition issued thereon, and urged in support of his contestation that sub-sections 14 and 15 of section 92 of the British North America Act, 1867, authorized the Provincial Legislature, to wit, sub-section 14 to provide for the administration of justice including the maintenance and organization of provincial courts both of civil and criminal jurisdiction, and including procedure in civil matters in these courts, and sub-section 15 for the imposition by fine, penalty or imprisonment for enforcing any law of the province made in relation to any matter coming within any class of subjects enumerated in said section, and that by chapter 2nd of section 3 of the Revised Statutes of the province of Quebec, the said commissioners had full power and jurisdiction to act as directed by the said commission, and to commit the respondent to the common gaol of this district if he persisted in refusing to answer the question put to him by the said commissioners: wherefore he prayed that the said writ of prohibition be quashed as having been illegally issued;

"And considering that the enquiry which the said commissioners were authorized to make by the said commission is concerning a matter connected with the good government of the province and the conduct of the public business therein; that such enquiry is not regulated by any special statute, and that the issuing of the said commission came within the powers conferred on the Lieutenant-Governor by Article 596 of the Revised Statutes of the province of Quebec;

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"And considering that by virtue of Art. 598 of the said Revised Statutes, the commissioners acting under said commission had the same power to enforce the attendance of witnesses, and to compel them to give their evidence before them, as is vested in any Court of law in civil cases, and had therefore the power to punish by fine or imprisonment, or both, any contempt of their authority by any person summoned as a witness refusing to appear or to answer questions put to them concerning the matters being the subject of such enquiry;

"And considering that the matter to be enquired into under the said commission is within the category of subjects mentioned in Article 596 of the Revised Statutes of Quebec, and that under the provisions of the B. N. A. Act, 1867, the legislature of the province was empowered to enact the provisions contained in Articles 596 and 598 of said Revised Statutes of Quebec;

"And considering that the said commissioners, acting under the authority of the said commission, had the right to compel the respondent to answer the questions put to him as a witness appearing before the said commissioners, and to punish him by fine or imprisonment, or both, for his refusal to do so;

"And considering that even if the said commissioners, in the course of the inquiry which they were duly authorized to make, had permitted some irregular or illegal questions to be put to the respondent, their improper ruling on the subject could not have authorized the issue of a writ of prohibition, which only applies to cases of want of jurisdiction, and not to cases of erroneous judgments, for which other remedies are provided;

"And considering that there is error in the judgment rendered by the Superior Court on the 25th of July, 1890, maintaining the said writ of prohibition;

"This Court doth reverse the said judgment of the 25th of July, 1890, and proceeding to render the judgment which the said Superior Court should have rendered, doth declare that the said writ of prohibition was improvidently issued, and doth quash and annul the

same without costs. (Hon. Mr. Justice BABY and Hon. Mr. Justice DOHERTY dissenting)."

Judgment reversed. [1]

Hutchinson & Oughtred for appellant.

Doherty & Doherty for respondent.

(J. K.)

June 25, 1891.

Coram BABY, BOSSÉ, DOHERTY, CIMON, JJ.

GEORGE McBEAN
(*Defendant in Court below*),
APPELLANT;

AND

WALTER MARSHALL ET AL.
(*Plaintiffs in Court below*),
RESPONDENTS.

Sale of goods—Slight variation from conditions of contract—Sight drafts.

M. sold McB. ten car loads of peas, price payable by drafts at sight, with bills of lading attached. M., with the first car load, made a draft on demand instead of a sight draft, asking at the same time to be informed whether McB. wanted the rest at sight. McB. refused to accept the draft, or to take delivery of the peas, and repudiated the contract.

HELD:—That the slight difference in the drafts did not constitute a sufficient reason for McB. to repudiate the contract, as he might have accepted the demand drafts on condition that they would be payable only three days after acceptance; and moreover it appeared that he had repudiated the contract on a different ground before the drafts were presented.

APPEAL from a judgment of the Superior Court, Montreal (GILL, J.) Oct. 4, 1889, as follows:—

"The Court, etc...

"Considering that the plaintiffs have proved that at the time mentioned in their declaration, September 1888, they

[1] A similar judgment was rendered in the cases of *Turcotte & Tarte* and *Turcotte & Pacaud*.

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sold to defendant 5,032 bushels, or ten cars of peas, for the price of 70 cents per bushel of 60 pounds, payable by drafts at sight, to be drawn by plaintiffs on defendant with the bills of lading attached, and that having shipped the said peas as agreed upon, and drawn on defendant, the said defendant refused to accept delivery of the peas and to accept the drafts, whereupon plaintiffs after due *mise en demeure* sold the peas at a loss of six cents per bushel on the above price, which forms an amount of $301.92 lost by plaintiffs on the said quantity, amount which they now seek to recover from defendant ;

" Considering that the slight difference in the drafts, which were made payable on demand instead of sight, did not constitute a sufficient reason for the defendant to repudiate his said contract ; that he could have accepted the demand drafts on condition that they would be payable only three days after acceptance, and moreover it has been proved that he had repudiated his said contract, as per his letter to plaintiffs, even before the drafts were presented, so that the reason of his refusal founded on the difference in the drafts is but a pretence arising out of an after-thought, and that the real motive of his refusal was the fall in the price of peas which had taken place in the interval ;

" Dismissing defendant's plea and the surplus of plaintiffs' demand ;

" Doth condemn defendant to pay and satisfy to plaintiffs the said sum of three hundred and one dollars and ninety-two cents with interest from date of service, and costs *distraits*, etc. "

May 21, 1891.]

Mallette for appellant :—

The appellant purchased the peas under a contract by which the shipment of the peas was to be accompanied by drafts at sight instead of the drafts which came forward with the peas, which were demand drafts.

The appellant submits that he was entitled to refuse payment of these drafts, and that the respondents never made a proper tender of the peas in question to him.

A sight draft entitled the drawee to three days of grace for its payment, whereas a demand draft is payable at once without any days grace.

It is in evidence that sight drafts are usually left by the Bank in the hands of the drawee for one or two days for the purpose of acceptance, thus giving four, five or six days from the date of the receipt of the draft before the same has to be paid. This makes a substantial difference to a merchant who is doing a large business and requires to use a large amount of money.

It is submitted on behalf of the appellant that the contract must be taken in its entirety, and under it these peas were to be paid for by sight drafts, and it is as much the essence of the contract as the price or quality, and the respondents should have made a proper tender of these peas accompanied by sight drafts as called for by the contract.

The appellant submits that inasmuch as respondents have never carried out their contract or made a proper tender or offer of the goods, he was not in default of accepting the same, and the judgment condemning him to pay damages should be reversed.

Duclos for respondents :—

On the 21st September, 1888, the respondents shipped the first car load of peas and drew on the appellant for the price, attaching the bill of lading, not however by draft at sight, but by a draft on demand, advising the appellant at the same time of their having done this, as follows : " Sight drafts are ¼; on demand ⅛ 0/0, hence our drawing demand, if you want rest at sight let us know. "

Meanwhile the market had fallen, and the appellant, on the 20th September, before the shipment of the first car, tried to repudiate the whole contract and back out of the transaction, giving at that time as his excuse that the respondents refused to guarantee the outturn.

The respondents immediately notified the appellant that they would hold him to the contract, and continued forwarding the peas, and on the 29th September, the appel-

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lant still refusing to accept delivery, the peas were sold to A. D. Thompson & Co. for 64 cents per bushel, the market value for peas on that day.

This made a clear loss of six cents per bushel on 5,033 bushels, amounting to the sum of $301.98.

The respondents brought the present action to recover this loss, and the judgment of the Superior Court maintained their action and condemned the appellant to pay the $301.98.

The appellant's only plea is this: That the contract stipulated that the peas should be payable by drafts at sight; the drafts drawn on him were not sight drafts, as they should have been under the terms of the contract, but were demand drafts, and consequently that he was entitled to cancel the purchase.

In answer to this pretention the respondents submit:

1. That the appellant having repudiated the contract before the drafts were presented, the alleged reason of his refusal, founded on the change in the drafts, is a mere pretence arising out of an afterthought, the real motive of his refusal being the fall in the price.

The first draft was received by the Bank of Toronto on the 25th September, 1888, and was by it presented for acceptance on or after that day.

Now on the 20th September, 1888, some five days before the presentation of the draft, the appellant had written to the respondents repudiating the contract for the alleged reason that they refused to guarantee the outturn. This reason also was unfounded, since he had accepted the outturn guaranteed within ½ per cent as per telegram of 19th September. On the other hand, it is proved that the market had declined, and undoubtedly this was the true reason of appellant's refusal.

2. The slight difference in the drafts, which were on demand instead of at sight, did not constitute a sufficient reason to repudiate the contract, more particularly as the appellant had the right to accept the drafts conditionally and make them payable three days after the acceptance, which would have been equivalent to sight drafts (See

Art. 2293 C. C.,) ; and moreover the change was made after notice to him, with his knowledge, in order to save him ⅛ per cent on the bank charges.

Although advised of the change by the letter of the 21st September, 1888, some days before the drafts were presented and in ample time for him to object if he were not satisfied, the appellant makes no dissent and allows the drafts to come down as they were, thus tacitly consenting to the change, which being for his own benefit he would the more readily be supposed to have agreed to.

June 25, 1891.]

The Court unanimously confirmed the judgment appealed from.

Judgment confirmed.

Greenshields & Greenshields for appellant.

McCormick, Duclos & Murchison for respondents.

(J. K.)

March 21, 1891.

Coram DORION, C. J., BABY, BOSSÉ, DOHERTY, CIMON, JJ.

CORPORATION OF THE VILLAGE OF HUNTINGDON,
(*Respondent in Court below*),

AND

HON. J. E. ROBIDOUX, ÈS-QUAL.,
(*Intervenant in Court below*)
APPELLANTS ;

AND

JAMES MOIR,
(*Petitioner in Court below*),
RESPONDENT.

Constitutional law—Sale of intoxicating liquors—Municipal corporation—Art. 561, *M. C.—R. S. Q.* 6118.

HELD :—That article 561 of the Municipal Code, as amended by 51-52 Vict., ch. 29, s. 6 (R. S. Q. 6118), by which a municipality is authorized

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to prohibit the sale of intoxicating liquors in quantities less than two gallons, within the limits of the municipality, is within the powers of the provincial legislature.

APPEAL from a judgment of the Circuit Court for the county of Huntingdon, district of Beauharnois (BÉLANGER, J.), May 26, 1890, as follows :—

"La Cour ayant entendu les parties en cette cause par leurs avocats respectifs, tant sur la réponse en droit de l'intimé que sur le mérite de la requête du requérant en appel du réglement, y-mentionné, examiné la procédure, etc.;

"Considérant qu'il est en preuve que le requérant est et était à la date de la dite requête en appel, et de sa signification à la dite intimée, dûment qualifié comme électeur dans et pour la municipalité ou corporation du village de Huntingdon dans le comté de Huntingdon, dans le district de Beauharnois, et comme tel il est et était dûment qualifié à porter l'appel en cette cause;

"Considérant que le requérant a fourni et produit le cautionnement requis en semblable cas;

"Considérant qu'à une session générale du Conseil Municipal du dit village de Huntingdon, tenue au dit village de Huntingdon, le 8 avril 1890, le dit conseil municipal a passé un réglement sous No. 105, dans les termes suivants, en langue anglaise, comme suit: 'A by-law to 'prohibit the sale by retail of intoxicating liquors within 'the limits of this municipality, and the granting of 'licenses therefor;

'Sec. 1.—On and after the coming into force of this by-'law, the sale of intoxicating liquors in quantities less 'than two gallons, imperial measure, at one and the same 'time, within the limits of the municipality of the village 'of Huntingdon, and the granting of any license or licen-'ses therefor shall be and is hereby prohibited.' Lequel réglement a été subséquemment promulgué, suivant que pourvu par le Code Municipal de cette province pour les réglements municipaux autorisés par le dit Code;

"Considérant que le dit réglement a été ainsi passé et

adopté par le dit conseil municipal, sous l'autorité de l'article 561 du dit Code Municipal tel qu'amendé (le dit article 561) par le chapitre 29, sec. 6 des statuts de la législature de cette province, passés dans les cinquante-et-unième et cinquante-deuxième années du règne de Sa Majesté la Reine Victoria;

"Considérant que la législature de la dite province n'a et n'avait, en vertu des pouvoirs à elle conférés par "l'Acte de l'Amérique Britannique du Nord, 1867," aucune autorité de restreindre et limiter le trafic et le commerce des boissons enivrantes, prohibant la vente, en tout ou en partie, tel pouvoir appartenant exclusivement au parlement du Canada;

"Considérant que le dit article 561 du Code Municipal (sec. 561 du chap. 68 de l'Acte de la province de Québec, passé dans la 34me année du règne de Sa Majesté) tel qu'amendé par le chapitre 29, sec. 6 des actes de la législature de la dite province, dans les années cinquante-et-unième et cinquante-deuxième du règne de Sa Majesté, a pour effet de conférer aux conseils municipaux le pouvoir de restreindre et limiter le trafic et le commerce de boissons enivrantes, en leur permettant d'en prohiber la vente, en quantité moindre que deux gallons, mesure impériale, ou qu'une douzaine de bouteilles contenant pas moins d'une chopine, mesure impériale, et qu'en agissant ainsi la dite législature de Québec a conféré aux dits conseils municipaux un pouvoir qu'elle n'avait pas elle-même, et par conséquent qu'elle n'a pas transféré légalement aux conseils municipaux, le dit article 561, tel qu'amendé comme susdit, étant *ultra vires* de la dite législature;

"Considérant que le dit conseil municipal en passant le dit réglement a, en conséquence de l'illégalité et nullité du dit article 561, tel qu'amendé comme susdit, agi sans pouvoir ou autorité valable, et partant que le dit réglement est nul, sans valeur légale et *ultra vires:*

"Et considérant que la dite requête en appel du dit réglement a été régulièrement signifiée au Procureur-Général de cette province, dans le temps et de la manière voulue par la loi, et que sur la dite notification le dit

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Procureur-Général a produit une requête en intervention, et a, comme tel, intervenant, plaidé la légalité et la constitutionalité du dit article 561 du dit Code Municipal tel qu'amendé ;

"Et considérant que le dit Procureur-Général est mal fondé dans ses allégations et ses dites conclusions par lui prises, quant à la légalité et la constitutionalité du dit article 561, tel qu'amendé comme susdit ;

"Renvoie les réponses de la dite intimée, la dite corporation du village de Huntingdon, avec dépens, déclare le dit requérant bien fondé, dans sa dite requête, le dit réglement du 8 d'avril dernier, passé comme susdit par le dit conseil municipal du village de Huntingdon, *ultra vires*, nul et sans effet, et en conséquence casse et met à néant le dit réglement, et condamne la dite intimée, la dite corporation du village de Huntingdon, aux dépens de la dite requête, distraits, etc."

Jan. 23, 1891.]

R. C. Smith, for the corporation of Huntingdon :—

This appeal is from a judgment of the Circuit Court, county of Huntingdon, quashing and annulling a by-law of the corporation appellant. On the 8th April last the municipal council of the village of Huntingdon passed a by-law, to prohibit the sale by retail of intoxicating liquors within the limits of the municipality, and the granting of licenses therefor. This by-law was passed under the authority of Article 561 of the Municipal Code. On April 26, the respondent, as an elector of the village, gave notice of a petition to quash the by-law, and this petition was presented to the Circuit Court at Huntingdon on the 8th May following. The petition set forth eight reasons for quashing the by-law, but the argument resolved itself into one question only, viz. : Whether Article 561 of the Municipal Code is within the powers of the legislature of this province. The corporation appellant filed an answer in law and a general answer.

The case upon which appellant principally relies as being the leading authority is that of *Sulte* v. *Corporation*

of Three Rivers, in which it was held that the powers in question are properly exercised by the legislature, under sub-section 8 of section 92 of the B. N. A. Act. The judgment of this Court is reported in 5 Leg. News, p. 330, and the judgment of the Supreme Court in 2 Supreme Court Reports, p. 25. On reference to the report of the remarks of their lordships in the Supreme Court, it will be found that they entirely concur in the judgment of this Court. Their lordships also fully discussed the cases that had previously been decided upon the various acts of legislation respecting the sale of intoxicating liquors.

As pointed out in the judgment of this Court, in determining what is included in the term "municipal institutions," in sub-section 8 of section 92 of the B. N. A. Act, regard must be had to the state of things existing at the date of Confederation, and the powers conferred by Article 561 of the Municipal Code clearly existed as an institution in this province and several other provinces of the Dominion before Confederation. (See C.S.L.C., cap. 24, sec. 26, s. s. 11 and 12, and sec. 27, s. s. 16).

The Court of Appeals of Ontario decided an exactly similar case in *Slavin* v. *The Corporation of Orillia*, reported in I Cartwright, p. 688.

While authority so clearly in point exists it is perhaps profitless to discuss at any length the numerous cases decided, but appellant would refer to the case of the *Queen* v. *Hodge*, 9 Appeal Cases (H. of L. and P. C.), p. 117; and particularly to the remarks of his lordship rendering judgment, found on page 130, where the case of *Russell & The Queen* is commented upon; *Poulin* v. *Corporation of Quebec*, 9 Supreme Court Reports, p. 185; *Blouin* v. *Corporation of Quebec*, 7 Quebec Law Reports, p. 18; *Denton* v. *Daly*, Doutre's "Constitution of Canada," p. 124; opinion of the Supreme Court, rendered 12th January, 1885, *in re* the Liquor Licence Act, 1883, upon reference by the Governor-General in Council, Cassell's Supreme Court Digest, p. 379, confirmed by the Privy Council.

It is worthy of note that in this Act, which was de-

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clared *ultra vires* of the Dominion Parliament, and was subsequently repealed, Parliament specially recognized that such powers existed in this province before confederation. This Act of the Dominion Parliament (46 Vict., sect. 45), read as follows :—

"No provision in this Act contained shall affect the "powers conferred on the municipal councils in the pro- "vince of Quebec of each county, city, town, village, "parish and township by the laws in force in the said "province on the 1st day of July, 1867, to restrict or pro- "hibit the sale of intoxicating liquors in the limits of "their respective territorial jurisdiction, and the said "powers and the by-laws now in force passed under the "authority of the said laws are hereby preserved and "confirmed."

Appellant, therefore, submits that its answer in law was well founded, and that the respondent's petition should have been rejected with costs.

Seers for the attorney general.

D. C. Robertson, and *A. E. Mitchell*, for the respondent, contended that the Quebec legislature has no right to authorize the absolute prohibition of the sale by retail of intoxicating liquors. It may regulate the traffic, and restrict the hours during which the sale may be carried on, but cannot prohibit the sale altogether. The power of prohibition pertains to the Dominion Parliament alone. Conditional prohibition pertains to the local legislature, as well as the power to make reasonable police regulations for the maintenance of order, etc.

March 21, 1891,]

DOHERTY, J., in rendering the judgment, stated that the question had already been settled by the highest tribunals. The right of the provincial legislature to pass prohibitory liquor laws existed as incidental to municipal institutions. The local legislature had authority to enact Article 561 of the Municipal Code, and the corporation of Huntingdon had the right to pass the by-law in question. His Honor did not think it necessary to detain the bar by entering into a lengthy examination of the case,

as the question had come up before, and had been settled by the highest courts. The judgment of the Court below which quashed the by-law, would therefore be reversed. The appeal of the Attorney-General would also be maintained.

The judgment is as follows :—

"The Court, etc.....

"Considering that Article 561 of the Municipal Code, and the matters thereby provided for, are within the competency and powers of the legislature of this province, and not *ultra vires* thereof, as in this cause pretended and pleaded by the respondent, by his petition in this behalf produced ;

"And considering therefore that the municipal council of the corporation, appellant to this Court, in passing and enacting the by-law appealed against by respondent to the Circuit Court, from the judgment of which this appeal hath been taken, was competent and acted *intra vires* under said article in passing said by-law, and that the same is in all respects legal and binding for all the purposes thereof and of the said article ;

"And considering that there is error in the judgment *a quo*, to wit, the judgment rendered on the 26th day of May, 1890, by the Circuit Court for the county of Huntingdon, in the district of Beauharnois,, in this, that it held and holds the contrary, and that said article and by-law were so *ultra vires*, and the conclusions of the Attorney-General unfounded ;

"Doth reverse and make void the said judgment ; and rendering the judgment which the Court below ought to have rendered as well on the respondent's said petition as on the intervention in this cause filed by the Attorney-General, doth dismiss the said petition, with costs as well in the Court below as in this Court, in favor of the corporation appellant, and against the said James Moir, the respondent, and maintain the said intervention without costs."

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Judgment reversed.[1]

Maclaren, Leet, Smith & Smith for the appellant corporation.

Seers & Laurendeau for the Attorney-General.

A. E. Mitchell for the respondent.

(J. K.)

(CROWN SIDE.)

December, 1891.

Coram WURTELE, J.

REGINA v. ARENT.

Criminal law—Refusal to provide for wife.

HELD:—That on an indictment of a husband for refusal to provide for his wife, the jury should not consider evidence as to the manner of living between husband and wife previous to the time laid in the indictment, or promises made by the husband after his arrest.

A. was arrested and indicted for refusal to provide for his wife in the month of October, 1891. Evidence was adduced to show that accused had deserted his family in New York about a year previously, and had come to Montreal with considerable money, and has been residing there since, but has made no provision whatever for his family on leaving New York or since. That for some three years previous to his leaving New York they had lived unhappily, even living apart, accused having claimed that his wife was extravagant. Also, after his arrest, he offered and promised to do everything in his power to provide for his wife and children if released.

WURTELE, J., in charging the jury, said that evidence of what occurred between, or the relations between husband and wife before his arrival in Montreal, would neither be a defence to his guilt, nor should be taken into account as prejudicing their minds against him. That

[1] The appeal to the Supreme Court was quashed. See 14 Leg. News, 378.

any promises made after his arrest, while possibly they might show an indication of a desire to do better in the future, would not avail the defendant, as the offence charged against him was committed before his arrest, and sorrow therefor, or promise of amendment, could not excuse an offence already committed. Verdict: *Guilty.*

Maclaren, Leet, Smith & Smith for private prosecution.

Edmund Guerin for prisoner.

(S. P. L.)

September 26, 1891.

Coram LACOSTE, C. J., BABY, BOSSÉ, WURTELE, JJ.

ROMEO H. STEPHENS,
(*Defendant in Court below*),
APPELLANT;

AND

ROBERT GILLESPIE, ES-QUAL.,
(*Plaintiff in Court below*),
RESPONDENT.

Action for reformation of account—Form of judgment therein —Desistment from part of judgment—Costs.

HELD:—1. In an action against an agent for reformation of an account rendered, where the judgment ordered the account to be reformed within thirty days, by adding to the balance offered, certain sums proved to have been omitted in the account, and the judgment proceeded to condemn the defendant to pay the amount omitted, before the balance due and payable had been established in due course of law, that the latter part of such judgment is irregular and erroneous.

2. Where the plaintiff desisted from the latter part of the judgment above mentioned, and obtained *acte* of *désistement*, pending an appeal by the defendant from the judgment, that the respondent should be held only for the costs of the appeal up to the time when he obtained *acte* of *désistement* as aforesaid, and that the appellant having failed on the other grounds of appeal, should be condemned to pay the costs of the appeal from the date when *acte* was obtained.

APPEAL from a judgment of the Superior Court, district

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of Montreal (TAIT, J.), June 8, 1889, in the following terms:—

"The Court, etc.....

"Considering that the plaintiff has proved the material allegations of his declaration, and particularly, that the accounts produced, rendered by defendant to plaintiff, therein referred to, and which plaintiff seeks to have rectified by the present action, are erroneous in that defendant has failed to account therein for the following sums, to wit, the sum of $1,382.45 received by him from Messrs. Whitney & Morton by their cheque for that amount, dated 15th July, 1875; the further sum of $720.75 drawn by him from the same firm by their cheque for that amount dated 10th May, 1876, which two sums defendant admits to have received by the admissions filed 12th June, 1888; the further sum of $249.24, being for the balance of the purchase price of the south half lot No. 2, in the 15th concession of South Plantagenet, sold to one Toussaint Lalonde, as shown by plaintiff's exhibit A2, and by the deed executed in favor of said purchaser dated 1st June, 1877, by which deed defendant acknowledged having received the entire purchase price; the further sum of $54.05, being the balance of the purchase price of lot No. 13 in the 17th concession of South Plantagenet, sold to one François Villeneuve, as shown by plaintiff's exhibit A3, and by the deed executed in favor of said purchaser dated 27th July, 1875, by which deed defendant acknowledged having received the entire purchase price; the further sum of $256.40, being balance of purchase price of the south half of lot No. 13 in the seventeenth concession of said South Plantagenet, originally sold to one Antoine Mercier, and subsequently divided and deeded, one half to said Mercier and the other half to one Longtin, as shown by exhibit No. 1 of plaintiff and the deed to said parties, dated 21st July, 1877, by which deeds defendant acknowledged having received the entire purchase price; the further sum of $151.82, being for the balance of the purchase price of the west half of lot No. 16, in the first concession of Cumberland,

sold to one Robinson Burch as shown by plaintiff's exhibit A4, and by the deeds executed in favor of said purchaser dated 20th Oct. 1878, by which defendant acknowledged having received the entire purchase price;

"Considering that said several sums form united the sum of $2,814.66, for which the defendant has failed to account in said accounts although said sum was received by him for and on account of plaintiff, and has also failed to establish any good reason why he should not account for the same;

"Considering that plaintiff has established his right to have said accounts rectified by having said sum included therein as having been received by defendant, and to have the balance shown by the last account of date 1st July, 1881, as due by defendant to plaintiff, to wit, $925.70, increased by the said sum of $2,814.66;

"Doth order and adjudge that defendant do reform the hereinbefore mentioned account so rendered by him to plaintiff, within thirty days from this date, and do include therein the said item amounting to the said sum of $2,814.66, said account to be so reformed by defendant under oath, and

"Doth further condemn said defendant to pay over to plaintiff the said sum of $2,814.66, together with the said sum of $925.70, with interest on said two sums from the 12th of October, 1882, being for the five years immediately preceding the date of the service of this action (C. C. Art. 2250-2267-2180) until paid, the whole with costs, *distraits*, etc."

Sept. 19, 21, 1891.]

Geoffrion, *Q.C.*, and *Carter*, *Q.C.*, for appellant:—

The respondent brings his action in his capacity of devisee, in trust, and sole acting executor of the last will of the late Robert Gillespie, his father, formerly of Montreal.

By the declaration the respondent alleged that he had appointed the appellant about the 26th of January, 1864, as agent, and that appellant continued to act as such agent up to the 1st July, 1881, in the management and

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disposal of properties belonging to the estate of the late Robert Gillespie, more particularly those situated in the province of Ontario, that as such agent he had received certain sums for which he had not accounted.

A further claim was made for $925.70 to be found in an account dated the 1st of July, 1881, rendered by appellant to respondent, and which respondent claimed had not been remitted.

It was alleged that on the 22nd September, 1883, the respondent had instituted an action against appellant and obtained a judgment in the Superior Court, but that the Court of Queen's Bench reversed this judgment (M. L. R., 8 Q. B. 167), but reserved the right of respondent to demand that the errors and omissions which should be established might be corrected, and the account reformed with regard thereto.

That on appeal to the Supreme Court of Canada, the judgment of the Court of Queen's Bench was confirmed.

By the prayer, the respondent asked that the statements of account rendered by appellant to respondent should be declared to be incomplete and insufficient, and that respondent should be ordered to reform the same within a delay to be fixed by the Court, and to include therein the amounts received by him from sundry persons, that he should be condemned to pay the sum of $2,814.66, together with the sum of $925.70, with interest; that he should be held by *contrainte par corps* to the payment of this sum, and that he should be further condemned to hand over the vouchers upon which his accounts were based.

The judgment appealed from is manifestly erroneous. It finds that the appellant has received the different sums from Whitney & Morton and others, amounting to $2,814.66, and that appellant has failed to account for the same, and it orders the appellant to reform within thirty days, under oath, the accounts by him rendered, by having the balance shown by the account dated 1st July, 1881, of $925.70, increased by the said sum of $2,814.66, but the judgment goes further, and condemns the appellant to

pay to the respondent the said sum of $2,814.66, together with the sum of $925.70, the whole with interest and costs; so that by the judgment, although the appellant might reform the accounts, and might show that nothing was due, yet, nevertheless, there is a condemnation against him for both amounts, with interest and costs.

Upon the appeal being taken the respondent endeavored to correct the judgment so rendered, and served a notice, dated 12th July, 1889, offering to consent to the judgment being reformed. This was followed by a motion made before this Court, on the 16th September, 1889, setting forth the above notice, offering to consent to the judgment being reformed, and asking that the judgment appealed from be reformed, and the record sent back to the Superior Court for further adjudication, after the appellant had reformed his accounts, or made default to do so, but this motion was not granted.

The appellant submits that neither the notice of the 12th of July, nor the motion of the 16th September, can avail the respondent. If the respondent wished to renounce the judgment—in whole or in part, he could by giving a notice in conformity with Article 477 of the Code of Civil Procedure, have renounced to the judgment —or a part thereof, and have such renunciation recorded by the prothonotary. Had this been done the case would have been placed in the same position as it was before judgment; the offer to renounce is not sufficient, it must be the renunciation itself, and this must be signed by the party himself, or some duly authorized person on his behalf, as attorney *ad hoc*; *Préfontaine* v. *Brown*, 1 Q. L. R. 60.

Moreover the offer to renounce to the judgment did not go far enough, as it should have included the sum of $925.70.

As the judgment became a final judgment from the condemnation made, the proper course for the respondent to follow would have been to renounce to the judgment, to have allowed the case to be re-inscribed, and to have had an interlocutory judgment ordering the recti-

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fication of the accounts; he could have obtained *acte* of his renunciation, and have then applied to this Court to have the appeal dismissed, upon his paying the costs incurred, but this he has not done. He has never renounced or desisted from the judgment. The appellant could not by the notice of 12th July, 1889, be forced to consent to a judgment, or to a modification thereof, but by a proper proceeding, (which was not followed by the respondent) as indicated by Article 477, appellant could have been compelled to accept a judgment, under reserve of a right to appeal.

The respondent has no right to force the appellant to appeal from a final judgment—and incur all the costs incident to such an appeal, when by following the established procedure, these costs could have been avoided. Had the judgment been simply an interlocutory one, the appellant would have been in a position either to submit, or ask for leave to appeal, but this has been denied him by the course adopted by respondent.

Béique, Q.C., and *A. D. Nicolls*, for respondent:—

The respondent instituted this action in the Superior Court to obtain two things:

1. The reformation of accounts rendered him, in his quality of executor of the estate of the late Robert Gillespie, his father, of London, England, part of whose estate was in Canada, and for which part the defendant appellant had been agent; and

2. To obtain payment of the amount due.

The accounts which had been rendered were filed in the Superior Court, and the plaintiff on the 8th June, 1889, obtained a judgment ordering the reformation of the accounts, to include certain amounts proved to have been omitted, in all, $2,814.66; but the Court went further than was then necessary, and condemned the defendant to the *payment* of such amounts, and a balance shown by appellant's accounts, $925.70, or in all $3,740.36.

The present appeal was instituted from this judgment on the 4th July, 1889, and on the 8th of the same month

the present respondent filed a notice of his consent to modify the judgment, as follows:

Take notice that the respondent hereby offers to consent to the judgment rendered herein on the 8th of June last past (1889) being reformed in such a way as to substitute to the following portion thereof, to wit: "and "doth further condemn said defendant to pay over to "plaintiff the said sum of $2,814.66, etc.," the following, "The Court reserving to adjudicate upon the other "conclusions taken by plaintiff after the said defendant "has reformed the said accounts as above or has made "default to do so," and to have withdrawn for the present the following words from the last paragraph but one of said judgment, "and to have the balance shown "by the last account of date 1st July, 1881, as due by "defendant to plaintiff, to wit, $925.70 increased by the "said sum of $2,814.66."

In the following term the respondent moved to have the judgment so reformed, understanding that the appellant was going to acquiesce therein; but this being apparently an error, and the appellant declaring he did not acquiesce, the Court granted respondent *acte* of the offer to modify the judgment. The offer and motion, upon which *acte* was granted, were made by the attorneys of record for the respondent, and formed part of the appeal proceedings, and should be entirely sufficient. In order to avoid doubt, however, the respondent filed with his answers to reasons of appeal, a special authorisation to his attorneys of record, from Mr. John McIntosh, attorney in Canada for the said respondent under a power of attorney which, amongst other powers, included that necessary for the purpose.

The respondent now takes the position that he has made an effective offer to modify the judgment rendered, so that it would only be a judgment ordering the reformation of the accounts, and reserving the respondent's rights to proceed to a judgment ordering payment, after the reformation.

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Sept. 26, 1891.]

The judgment was modified as follows :—

"The Court of Our Lady the Queen, now here, having heard the appellant and respondent by their counsel respectively, examined as well the record and proceedings had in the Court, as the reasons of appeal filed by the appellant, the answers thereto, and the consent filed by the respondent, for a modification in the judgment appealed from, and mature deliberation on the whole being had;

"Seeing that the respondent by his action seeks a reformation of the accounts rendered by him to the appellant, as his agent or mandatary, and of which the last was so rendered on the 1st day of July, 1881, with respect to six sums which, he alleges, were omitted by the appellant in such accounts, viz: $1,382.45 received by him from Messrs. Whitney & Morton, by their cheque dated 15th July, 1875; $720.70, also received by him from the said Whitney & Morton, by their cheque dated 10th May, 1876; $249.24, received from Toussaint Lalonde for the balance of the price of the south half of lot No. 2, in the 15th range of the township of South Plantagenet, under deed of sale dated 1st June, 1877; $54.05, received from François Villeneuve, for the balance of the price of lot No. 13, in the 17th range of the said township of South Plantagenet, under deed of sale dated 27th July, 1875; $256.40, received from Antoine Mercier and Louis Longtin, for the balance of the price of the south half of lot No. 13, in the 17th range of the said township of South Plantagenet, under the deeds of sale dated the 21st of July, 1877; and $151.82, received from Launcelot Robinson Burch, for the balance of the price of the west half of lot No. 16, in the first range of the township of Cumberland, under deed of sale, dated 20th October, 1878; forming in all the sum of $2,814.66, and asks for a condemnation against the appellant for the said sum of $2,814.66, and also for the sum of $925.70, being the balance appearing to be due to the respondent by the last of the accounts rendered, bearing date the 1st of July, 1881, with interest at the rate of 7 per cent per annum

from the date at which the said sums were respectively received;

"Seeing that by the judgment appealed from, to wit, the judgment rendered by the Superior Court at Montreal on the 8th of June, 1889, the appellant is adjudged and ordered by the first paragraph of the adjudication, to reform his said accounts within thirty days from its date, and to include therein the above mentioned sums, amounting to $2,814.66, and is also by the second and last paragraph of the adjudication, condemned to pay to the respondent the said two sums of $2,814.66 and $925.70, with interest from the 12th of October, 1882;

"Considering that it appears by the proof adduced that the respondent received the above mentioned six sums of money, and omitted to include them in the accounts rendered by him, from time to time, to the respondent, and that he is accountable therefor, and consequently amenable to a reformation of the accounts so rendered by him;

"Considering that before proceeding to condemn the appellant to pay any sum as and for the balance due under the said accounts, it is necessary to allow him to reform his accounts, and to arrive at a settlement of the balance which might be due either by an acceptance of the accounts so reformed, or on a contestation thereof, or if he should fail to reform his said account, to proceed to establish such balance in the manner provided in Article 533 of the Code of Civil Procedure;

"Considering therefore that there is no error in the first paragraph of the adjudication, contained in the judgment appealed from, ordering the appellant to reform his accounts, with respect to the six sums omitted as above mentioned, but that there is error in the second and last paragraph of the said adjudication, condemning the appellant to pay the said sums of $2,814.66 and $925.70 to the respondent, before the balance due and payable had been established in due course of law;

"Seeing that the respondent, on the return of the writ of appeal, declared that he was willing that the judg-

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ment appealed from should be modified by striking out the second and last paragraph of the adjudication, and that act was granted to him of the production of his consent to that effect;

"Seeing that a judgment could thereupon have been obtained, modifying the judgment appealed from, without incurring all the further ordinary costs of an appeal;

"Considering that it is desirable to discourage and, when possible, to prevent the incurring of unnecessary costs;

"Doth set aside the adjudication of the judgment appealed from, and proceeding to render the judgment which should have been pronounced;

"Doth adjudge and order the appellant to reform the accounts rendered by him to the respondent up to the 1st day of July, 1881, within 30 days from this date, and to include therein the sums hereinafter mentioned, which he omitted therefrom, and which he had received from the following persons, to wit: (*enumeration as above*), forming in all $2,814.66, and to render such reformed account under oath, and to file the same in the prothonotary's office within the delay above fixed, together with all vouchers in support thereof, reserving to the said Superior Court to further adjudicate as to law and justice may appertain after the rendering of such reformed account, or on the failure of the appellant to render one;

"And proceeding to adjudicate on the costs in appeal, doth condemn the respondent *es-qualité* to pay the costs incurred by the appellant up to the 20th day of September, 1889, on which day act was granted of the production of the respondent's consent to the modification of the judgment appealed from, of which distraction is granted to appellant's attorneys, and doth condemn the appellant to pay the costs incurred by the respondent since the above mentioned date, of which distraction is granted to respondent's attorneys."

Judgment modified.

Carter & Goldstein for appellants.
Chapleau, Hall, & Nicolls for respondent.

(J. K.)

September 27, 1891.

Coram LACOSTE, C. J., BABY, BOSSÉ, WURTELE, JJ.

CORPORATION OF THE VILLAGE OF VERDUN,
(*Plaintiff in Court below*),
APPELLANT;

AND

PROTESTANT HOSPITAL FOR THE INSANE,
(*Defendant in Court below*),
RESPONDENT.

Taxation—Insane asylum—Charitable institution—Exemption —R. S. Q. 2044, 6146.

HELD:—That an asylum for the insane, established and incorporated by an Act of the legislature, and supported chiefly by voluntary donations, the members of the corporation individually deriving no profit from the institution, is a charitable institution within the meaning of R. S. Q. 2044, 6146, and therefore exempt from the payment of municipal and school taxes.

APPEAL from a judgment of the Superior Court, Montreal (LORANGER, J.), Oct. 15, 1890, dismissing the appellant's action against the respondent, for municipal and school taxes upon the buildings occupied by it as a hospital for the insane.

The judgment is as follows:—

"La Cour, après avoir entendu les parties, au mérite, lu la preuve, examiné la procédure et délibéré;

"Attendu que la demanderesse réclame de la défenderesse la somme de $107.39, pour taxes scolaires et municipales, et que la défenderesse répond à cette action qu'elle est une institution de charité et comme telle exempte des taxes réclamées;

"Considérant que par acte de la législature de la province de Québec (44-45 Vict., chap. 50), la défenderesse est incorporée sous le nom de "l'Hôpital Protestant des Aliénés," pour soigner, entretenir et guérir les personnes malades, aliénées ou souffrant du dérangement d'esprit,

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ou autrement incapable d'agir pour elles-mêmes, qu'elle n'a pas été fondée en vue de réaliser des bénéfices, mais uniquement dans un but de charité, ses revenus devant être exclusivement employés à cette fin ;

" Considérant que l'administration des affaires de la défenderesse est faite gratuitement, et que les souscripteurs eux-mêmes ne reçoivent aucun intérêt sur le montant de leur souscription ; qu'il importe peu que la défenderesse ait emprunté avec intérêt, des sommes d'argent, ou qu'elle reçoive de l'aide du gouvernement, cela ne changeant en rien la nature ni le caractère de l'institution de même que les fins pour lesquelles elle a été fondée ;

" Considérant qu'aux termes des articles 2044, 2144 et 6146 des Statuts Refondus de la province de Québec, la défenderesse est exempte des taxes réclamées d'elle ;

" Considérant que la défense de la défenderesse est bien fondée ;

" Maintient la dite défense et renvoie l'action avec dépens, distraits, etc."

Sept. 18, 1891.]

N. T. Rielle for appellant :—

The action was taken to recover $107.39, being the amount of municipal and school taxes imposed by the municipality of the village of Verdun and by the school commissioners of said municipality in the year 1889. The facts were not disputed on either side, it being proved by the appellants that the taxes in question were regularly imposed, and, on behalf of the respondents, that the latter held the property sought to be taxed for the purposes for which they were incorporated. The respondents' sole ground of defence was that they were a charitable institution, and, as such, exempted from taxation under certain statutes of this province.

Exemption from municipal taxation is granted by Article 6146 of the Revised Statutes of the province of Quebec (Municipal Code, Art. 712, Sect. 3).

" The following property is not taxable . . . . 3. Pro-
" perty belonging to Fabriques or to religious, charitable
" or educational institutions or corporations, or occupied

"by such Fabriques, institutions or corporations, for the "ends for which they were established, and not possessed "solely by them to derive a revenue therefrom."

Exemption from school taxation is granted by Article 2044 of the Revised Statutes of the province of Quebec.

"The following are exempt from school taxes . . . . . "All buildings set apart for the purpose of education, or "of religious worship, parsonage houses, and all chari- "table institutions or hospitals incorporated according to "law, and the ground or land on which such buildings "are erected, and also all cemeteries." This article is supplemented by Art. 2144 R. S. P. Q., which extends the exemption to all properties occupied by charitable institutions for the purposes for which they were instituted.

The sole question for the consideration of the Court is whether the respondents are a charitable institution in the sense of the statutes above quoted.

It is an invariable rule that statutes which exempt certain privileged classes from the common burden of taxation shall receive the strictest interpretation.

It remains to be seen whether there is anything in the charter of the corporation respondent, or in its methods or mode of working, as explained in the evidence, to constitute it a charitable institution.

The charter of the respondents is contained in the Act 44-45 Vict., chap. 50 (Q.) This Act does not contain the words "charity" or "charitable," and simply constitutes certain persons and others who may be associated with them, a body corporate, for the purpose of maintaining a Protestant Hospital for the maintenance and cure of persons insane or suffering from mental aberration, or otherwise incompetent to act for themselves. It is important to note that this charter does not oblige the corporation to receive a single patient or inmate without charge. The only witness examined by the respondents testified that the respondents had been largely aided by voluntary subscriptions, and had also borrowed a considerable sum from the government of the province of Quebec, for which

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they granted a mortgage on their property, and that patients admitted to the institution were charged regular fees for the care given them by the institution; those able to pay for themselves doing so, and the government of the province paying a fixed sum per head, for the indigent insane.

The only facts which, according to the respondents, prove the latter to be a charitable institution are, that the object of the asylum is not to make money; that the charges to patients are made with the object of making the institution self sustaining; and that those in charge of the institution derive no individual profit from the enterprise. With regard to the last named circumstance there would seem to be some confusion between the corporation and the persons who have individually contributed money towards the maintenance of the institution. There is no doubt that the latter have been, and are, individually charitable in making these donations. As the question at issue, however, is whether the corporation respondent, as a corporate body, is a charitable institution, the individual charitable acts of persons interested in its corporate work can have no bearing on the case.

It will not be disputed that charity in its general acceptation, implies a gift of something without receiving payment or remuneration. The legal interpretation given to the word does not differ from the meaning usually attached to it, the accepted definition of charity being "a "*gift* to a general public use which extends to the poor "as well as to the rich," (*per* Lord Chancellor, in *Jones* v. *Williams*, 2 Amb. 651). To be considered a charitable institution from this point of view, and according either to the popular or the legal signification of the word "charity," the respondents would have to establish that they did what they had to do, or gave what they had to give, whether to individuals or to the public, gratuitously, and without receiving payment therefor. This has been made the test in a number of cases in American jurisprudence where analogous questions have been submitted for decision.

From the point of view that has been taken in English Courts it is "the source from which funds are derived, "and not the purposes to which they are dedicated, which "constitutes the use charitable" (per Vice-Chancellor Leach, in *Attorney-General* v. *Heelis*, 2 Sim. & Stu. 77).

If this were to be taken as the test, it would be necessary in order to constitute the respondents a charitable institution that their funds should be derived entirely from free gifts, whereas as a matter of fact they are largely dependent on money borrowed from the government, and for which the government holds a mortgage on their property.

Finally, if we consider the general principle on which certain bodies are considered charitable, and as such exempted from the burden of taxation, we shall find that "it is upon the ground that they perform service for the "public and to some extent at least relieve the state "from expense."

Cooley, Taxation, p. 202.

So far from performing any gratuitous service to the public, individually or collectively, the corporation respondent charges everyone full value for what it gives, while any service it does for the state is done at the expense of the state, and consequently cannot be considered to relieve the latter from expense.

L. H. Davidson, Q.C., for respondent:—

Respondents are incorporated in virtue of 44-45 Victoria, P. Q., chap. 50, for the purpose, according to the preamble of the Act, of erecting and maintaining a Hospital "for the care, maintenance, and cure of persons, "being insane or suffering from mental aberration, or "otherwise incompetent to act for themselves," and being Protestants, and with the object of making provision for the wants and for the employment of such afflicted persons in so far as they may be capable of work, and with the object of their support and cure.

Further, it is provided in the Act of Incorporation "That all and every, the rents, revenues, issues and pro-"fits of all the property of the corporation shall be applied

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"solely for the purposes of the corporation and the pay-
"ment of all such outlays and expenditure, as may be
"legitimately incurred in connection therewith, and for
"the carrying into effect of the objects contemplated by
"the Act."

It is indubitable that all the property upon which the taxes have been levied by the corporation of Verdun is held by the Hospital solely for the objects for which it was incorporated, and not for the purpose of deriving any income therefrom. None of it is rented to any other; and the produce obtained from the farm is used for the maintenance of the staff, inmates, and attendants, and indeed does not suffice for the purpose; additional aid by voluntary subscriptions of the charitable public being necessary.

Under these circumstances respondents contend that there can be no doubt that they are exempt from taxation under the provisions of law above mentioned.

Sept. 27, 1891.]

The Court unanimously affirmed the judgment appealed from.

Judgment confirmed.

N. T. Rielle for appellant.

Davidson & Ritchie for respondent.

(J. K.)

November 27, 1891.

Coram LACOSTE, Ch. J., BOSSÉ, BLANCHET, WURTELE and TAIT, JJ.

JOHN McVEY,
(*Plaintiff in Court below*),
APPELLANT;

AND

MARY McVEY ET VIR,
(*Defendant in Court below*),
RESPONDENT.

Pleading—Demurrer—Sufficiency of allegations—Compound interest.

HELD:—Where the plaintiff claimed a certain capital sum, and also computed compound interest as well as interest thereon, and alleged as to the total amount, "which said last mentioned sum the said de- "fendant hath often admitted to owe and promised to pay to the "said plaintiff, but has always neglected to do so,"—that the allegations of the declaration justified a conclusion for the whole amount, and that it was not necessary to allege specially that the defendant had promised to pay compound interest.

APPEAL from an interlocutory judgment of the Superior Court, Montreal (PAGNUELO, J.), Sept. 15, 1891, in the following terms:—

"La Cour après avoir entendu les parties par leurs avocats sur la défense en droit plaidée par la défenderesse à la partie de la demande concernant l'intérêt composé;

"Considérant que le demandeur n'allègue pas que la défenderesse s'était engagée à payer l'intérêt composée sur le prix de vente en question;

"Maintient la dite défense en droit, et renvoie la partie de la demande par laquelle le demandeur réclame le dit intérêt composé, sauf l'intérêt sur l'intérêt depuis l'institution de cette action, avec dépens, distraits, etc."

Nov. 23, 1891.]

Pelissier for appellant.

Laflamme, Q.C., for respondent.

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Nov. 27, 1891.]

LACOSTE, Ch. J., rendered the judgment of the Court, reversing the judgment of the Court below, as follows :—

" La Cour, etc.....

" Attendu que l'appelant se pourvoit contre l'intimée pour le recouvrement de la balance du prix d'un immeuble, payable par versements annuels, avec intérêt payable semestriellement, qu'il capitalise tous les six mois l'intérêt du semestre échu, et réclame ensuite intérêt sur le capital ainsi formé, et qu'il réclame par sa déclaration la somme ainsi formée de $1,112. 81, contenant une somme de $102 provenant des intérêts composés, mais qu'il allègue dans sa dite déclaration, après avoir donné tous les calculs constatant les intérêts composés et avoir réclamé le total de $1,112.81, composé du capital et des intérêts composés, ' que la défenderesse a souvent reconnu devoir ' et a promis de payer la dite somme au demandeur, mais ' a toujours négligé d'en faire le paiement,' laquelle allégation est textuellement comme suit en langue anglaise : ' which said last mentioned sum the said defendant hath ' often admitted to owe and promised to pay to the said ' plaintiff, but has always neglected to do so ; '

" Attendu que l'intimée plaide par défense en droit que l'action est mal fondée jusqu'à concurrence de la dite somme de $102, montant des intérêts composés, parce qu'il n'est pas allégué que l'intimée devait payer les intérêts composés, et parce qu'il n'appert pas que la nature des obligations de l'intimée telles que relatées donne le droit à l'appelant de réclamer des intérêts composés ;

" Attendu que par le jugement interlocutoire rendu en cette cause par la Cour Supérieure siégeant à Montréal dans le dit district de Montréal, le 15 sept. 1891, la dite défense en droit a été maintenue, et la partie de la demande par laquelle l'appelant réclame le dit intérêt composé a été renvoyée, pour le motif que l'appelant n'allègue pas que l'intimée s'était engagée de payer l'intérêt composé sur le prix de la vente en question ;

" Considérant que l'allégation contenue dans la déclaration, ' que la défenderesse a souvent reconnu devoir et

'a promis de payer au demandeur la somme formée par 'le capital et les intérêts composés,' suffit comme base d'une condamnation contre l'intimée pour les intérêts composés réclamés, si les faits ainsi allégués sont admis par l'intimée ou s'ils sont établis par une preuve légale, et que l'intimée pouvait, si elle ne trouvait pas l'allégation suffisamment détaillée, demander des particularités avant de plaider ;

"Considérant partant qu'il y a mal jugé dans le dit jugement interlocutoire ;

"Infirme le dit jugement interlocutoire, et procédant à rendre le jugement qui aurait dû être prononcé, renvoie la dite défense en droit avec dépens, distraits à Mtres. St-Pierre, Globensky & Poirier, les avocats du demandeur, et condamne l'intimée à payer à l'appelant les frais de l'appel."

Judgment reversed.

St. Pierre, Globensky & Poirier for appellant.

P. U. Renaud for respondent.

(J. K.)

June 25, 1891.

Coram BABY, BOSSÉ, DOHERTY, CIMON, JJ.

COMMERCIAL MUTUAL BUILDING SOCIETY,
(*Plaintiffs in Court below*),
APPELLANTS ;

AND

LONDON GUARANTEE & ACCIDENT CO.,
(*Defendants in Court below*),
RESPONDENTS.

Insurance, Guarantee—Conditions of policy—Interpretation.

By a condition of the policy it was provided that the company should make good to the employer such pecuniary loss as might be sustained by him by reason of the dishonesty of the employee "committed and discovered during the continuance of this agreement, and within three months from the death, dismissal, or retirement of the em-

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ployee." The policy lapsed, and a defalcation was discovered four months afterwards.

HELD:—(By the Superior Court,) That the company was not liable in respect of such defalcation, inasmuch as it was not *discovered* as well as *committed* during the continuance of the agreement.

The policy also contained a clause that on the discovery of any fraud or dishonesty on the part of the employee, the employer should immediately give notice to the company. A defalcation was discovered April 6, and the company was not notified until April 17, when the employee had left the country.

HELD:—(By the Court of Queen's Bench), That the employer was not entitled to recover under the policy.

APPEAL from a judgment of the Superior Court, Montreal (DAVIDSON, J.), Nov. 27, 1889, dismissing the action.

DAVIDSON, J., in rendering the judgment of the Court below, made the following observations:—

This is an action upon a guarantee policy. Defendant pleads prescription, and furthermore urges a number of defences to the merits.

The policy issued in January, 1883, was renewed in 1884 and lapsed on the 1st of January, 1885.

The declaration charges that the employee warranted was guilty of various defalcations between the 1st of September and the end of the insurance. These were discovered on the 14th of April, 1885, and immediately notified to the company. Defendant denied liability, and the present writ issued on the 27th of January, 1885. We are first confronted with the issue of prescription. It is not stipulated in the policy as alleged by defendant that the action must be instituted within twelve months from the expiration of the policy. The actual covenant was that the process must be served "within the term of "twelve months next after the first discovery of any such "fraud or dishonesty as aforesaid." Defendant had the writ within that interval, and as a consequence must fail so far as this condition is concerned.

It is next denied that liability ever existed. The policy promises to make good defalcations "committed and dis- "covered during the continuance of this agreement, and "within three months from the death, dismissal, or re-

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"tirement of the employee." Then, later on, we find the following words: "And no more than one claim, and that "only in respect of acts or defaults committed within "twelve months from the date of the receipt by the com- "pany of such notice of discovery as aforesaid, shall be "made under this agreement." Here are limitations enough, and to spare. I ordered a re-argument in the hope that it might bring me a clearer idea of what these two clauses meant, under any circumstances possible of application to them. In the present case more than four months had elapsed after the expiration of the bond before the loss was discovered. What rights would have resulted and how far back the claim might have run had discovery come and dismissal followed, say on the last day of the insurance, has not been made clear. I have heard nothing to relieve me of the belief that the insurer and insured might then have very conflicting ideas as to the twelve and three months' limitations. These features are referred to that it may not be thought that they were overlooked, and to emphasize the opinion that the alternatives suggested do not apply to the present case. If, argues defendant, the claim may be discovered and made four months after the policy has ended, why not four years after just as well? It is not an instance of a liability once admittedly existing being avoided by omission to perform some condition subsequent, as sometimes happens under fire policies. Here it is denied that there ever was any liability at all. A defalcation did not of itself make the company responsible, for it had not only to be "committed," but also "discovered during the continuance of this agreement." Then, within this limitation came the further one that the crime and the discovery had to be "within three months from the "death, dismissal, or retirement of the employee." Here the Court has to deal not with a technical condition subsequent, but with the interpretation and extent of the very contract itself. It is not possible for me to adopt the ingenious suggestion that "and" meant "or", and that the clause ought to be read thus: "Committed and

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"discovered during the continuance of this agreement, "*or* within three months from the death, dismissal, or "retirement of the employee." The plain meaning of the clause, when so written, makes its interpretation as it is actually found in the policy all the more certain, and I have to judge that the defalcation "not having been discovered during the continuance of this agreement," but only four months after it ceased to exist, did not amount to a liability, and that the action must be dismissed with costs.

The formal judgment of the Court below reads as follows:—

"The Court having heard the parties by their respective counsel on the merits of this cause, examined the proceedings and proof of record, heard also the witnesses in open Court and deliberated;

"Seeing plaintiff claims that defendant is indebted to him in the sum of $2,000 under and by virtue of the guarantee policy of date 1st January, 1883, set forth in his declaration;

"Seeing defendant pleads a prescription of twelve months, further that no liability ever existed, and divers further pleas by way of avoidance;

"Considering that the policy issued in January, 1883, was renewed for 1884, and lapsed on the 1st of January, 1885;

"Considering that the defalcations charged extended from the 1st of September, 1883, to the end of the insurance;

"Considering that said defalcations were only discovered and the employee Fulton, dismissed on the 14th April, 1885, to wit, more than three months after the policy had expired;

"Considering that the present action issued on the 27th of January, 1886;

"Considering the action must be instituted not within twelve months from the expiration of the policy, as alleged by defendant's second plea, but 'within the term 'of twelve months next after the first discovery of any

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'such fraud or dishonesty as aforesaid,' within which said last mentioned interval this writ issued;

"Doth adjudge that defendant do take nothing by his said second plea;

"Considering that the policy only promises to make good defalcations 'committed and discovered during the 'continuance of this agreement and within three months 'from the death, dismissal or retirement of the employee;'

"Considering that a defalcation did not of itself make the company responsible, seeing that such defalcation had not only to be 'committed' but also 'discovered,' and that both committal and discovery had to be 'during the continuance of this agreement,' which discovery did not exist in the present case;

"Considering that the issue presented is not as to the application of a technical condition subsequent, but involves an interpretation and the extent of the very contract itself;

"Considering defendant hath maintained his third plea;

"Doth dismiss the action with costs, *distraits*, etc."

The conditions of the policy, so far as they affect the present case, are as follows:—

"Now in consideration of the sum of $20, as a premium, from January 1st, 1883, up to January 1st, 1884, and the premium of $20 hereafter to be paid to the company on or before the 1st day of January in each and every succeeding year;

"It is hereby agreed and declared that during one year from the date hereof, and during any year thereafter, in respect of which the company shall consent to accept the aforesaid premium, subject to the provisions of the memorandum and articles of association of the said company, and to the conditions herein contained (the whole of which conditions, whether appearing by way of proviso or otherwise, except so far as they relate to anything expressly agreed to be done after payment by the company, shall be conditions precedent to the right on the

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part of the employer to recover under this agreement) the company shall, at the expiration of three months next after proof satisfactory to the directors of the loss hereinafter mentioned has been given to the company, make good and re-imburse to the employer to the extent of the sum of $2,000 and no further, such pecuniary loss if any as may be sustained by the employer by reason of fraud or dishonesty on the part of the *employé* in connection with the duties hereinbefore referred to amounting to embezzlement of money, committed and discovered during the continuance of this agreement and within three months from the death, dismissal, or retirement of the *employé*.

"Provided, that on the discovery of any such fraud or dishonesty as aforesaid, the employer shall immediately give notice thereof to the company, and that full particulars of any claim made under this agreement shall be given in writing addressed to the company's chief agent in Canada, Toronto, Ontario, within three months after such discovery as aforesaid; and the company shall be entitled to call for, at the employer's expense, such reasonable particulars and proofs of the correctness of such claim and of the correctness of the statements made at the time of effecting, or made or deemed to be made at the time of the payment of any renewal premium, as the directors think fit, and to have the same particulars, or any of them, verified by statutory declaration. And no more than one claim, and that only in respect of acts or defaults committed within twelve months of the date of the receipt by the company of such notice of discovery as aforesaid, shall be made under this agreement, which upon the making of such claim, shall wholly cease and determine. And this agreement is entered into on the condition that the business of the employer shall continue to be conducted and the duties and (except that it may be increased) the remuneration of the *employé* shall remain in accordance with the statements and declaration hereinbefore referred to, and if during the continuance of this agreement any circumstances

shall occur or change be made, which shall have the effect of making the actual facts materially differ from such statements or any of them without notice thereof being given to the company at its chief office for Canada, and the consent or approval in writing of the company being obtained, or if any suppression or mis-statement of any fact affecting the risk of the company be made at the time of payment of the first or any subsequent premium, or if the employer shall continue to entrust the *employé* with money or valuable property after having discovered any act of dishonesty, or shall fail to notify the company if any writ of attachment or execution shall issue against the property or salary of the *employé*, as soon as it shall have come to the knowledge of the employer, this agreement shall be void and of no effect from the beginning."

May 21, 22, 1891.]

Lacoste, Q.C., and *Carter*, Q.C., for appellants:—

If the pretension of the respondent, which has been maintained by the Superior Court, should be sustained by this Court, bonds of a similar nature could not be considered as a yearly bond, for if the act of fraud had to be committed and discovered during the continuance of the bond, in many cases it would be impossible to make a claim.

The present bond expired on the 31st of December, 1884. On that day Fulton, at the last hour, might have committed acts of defalcation to the extent of the bond, which it would have been impossible to discover until after the expiration of the bond, say the following day, and yet the appellant would not be able to recover, because, *although the act was committed, it was not discovered, during the continuance of the bond.*

It is submitted that under the bond in question, so long as the action was brought within a year of the discovery the respondent is responsible. The condition goes further than stated by the learned judge in his *considérant*, and says "and discovered within three months of the "death, dismissal or retirement of the *employé*"

In the present instance, although the acts complained

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of were committed during the continuance of the bond, they were not discovered until three and a half months after the dismissal of Peter Fulton, inasmuch as he was dismissed on the 14th of April, 1885, and on that day his defalcations were known. The amount of these defalcations however was only discovered at the beginning of May following, after a thorough investigation had been made, and every account and transaction of the company appellant investigated, but still within three months of his dismissal.

The respondent is nothing more nor less than an insurance company, insuring the fidelity of employees; if any obscurity exists in the policy it is to be interpreted against the respondent. The same rule of law which prevails with regard to fire insurance policies should prevail in the present instance.

"La rédaction de la police étant le fait des assureurs, "les obscurités doivent être interprétées contre eux." Rolland de Villargues, Ass. Terr. No. 66.

The policy in question was prepared by respondent, and the conditions should be construed against it.

One of the conditions of the bond is that action must be brought within twelve months next after the first discovery of any fraud or dishonesty. In the present instance this has been done.

Another condition of the bond is that no more than one claim, and that only in respect of acts or defalcations committed within twelve months from the date of the receipt by the company of such notice of discovery as aforesaid shall be made under this agreement; that condition, likewise has been complied with.

Greenshields, Q.C., for respondents :—

The Superior Court dismissed the plaintiff's action and held, maintaining the defendant's third plea, that, by the terms of the policy, the acts of fraud and dishonesty, on the part of the employee, said Peter Fulton, had not only to be *committed*, but also *discovered*, and that both committal and discovery had to be "during the continuance of this agreement," which discovery did not

exist in the present case. In fact, it appears by the plaintiff's declaration, that the fraud had been discovered only in the month of April, 1885, and the policy expired the 1st of January, 1885.

The interpretation given to the policy in question, by the judgment of the Superior Court, is the only one that could have been given, and is the law of contracts, and specially of insurance contracts, and according to the terms of the policy. The clause by which the company defendants are only responsible for "acts of fraud and dishonesty, *committed and discovered*," during the continuance of this agreement, is clear, positive, and cannot be interpreted otherwise than as by the judgment appealed from.

The Superior Court did not adjudge on the other issues, and although not necessary to have the judgment confirmed, to adjudge upon all the questions raised in the cause, we submit that the defendant's fifth and sixth pleas are well-founded and sufficiently proved to have the action dismissed.

By the fifth plea, it is alleged, among other things, that the plaintiffs were aware, for a long time previous to the departure of said Peter Fulton from the city of Montreal, that there had been irregularities in connection with his accounts, and took no steps to cause his arrest; and that they did not notify immediately the defendants of the said irregularities, as soon as they came to their knowledge, as they were bound to do by the terms of the policy.

One of the clauses says: "Provided that on the dis-"covery of any such fraud or dishonesty as aforesaid, the "employer shall *immediately* give notice thereof to the "company."

It is established beyond all doubt that the plaintiffs, on the 6th of April, 1885, were aware of the defalcations of their employee, Fulton.

George Martin, president of the society plaintiffs, and witness produced on the part of the plaintiffs, admits this fact.

It thus appears that the plaintiffs knew on the 6th of

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April, 1885, that there were irregularities in the accounts of their employee in connection with his duties; and they did not notify immediately the defendants, as they were bound to do, but waited until the 17th of April, 1885, after the departure of Fulton from the city of Montreal, and when the defendants could not protect themselves if they were in any way liable.

The plaintiffs were guilty of gross negligence, and, by reason of the violation of the conditions of the policy, forfeited any right they might have had against the defendant.

The following authorities are conclusive and to the point:

Bigelow, Fire and Accident Insurance Reports, 4th Vol., p. 49.

Railway Passenger Assurance Company v. *Burwell.*

Held: That notice given six days after the alleged injury, which happened in the city where the policy issued, and where the company had a resident agent, was too late, without a sufficient excuse for the delay.

Pouget, Dict. des Assurances, 1st Vol., pp. 221–222.

Molsons Bank v. *Guarantee Company of North America*, M. L. R., 4 S.C. 376.

Held: Where the condition of a guarantee bond required the employer to give notice immediately to the guarantor of any criminal offence of the employee entailing loss, for which a claim was liable to be made under the bond, and the employer, although aware of a defalcation on the 25th, did not give notice thereof to the guarantor until the 27th, after the employee had left the country; that the claim under the bond was forfeited.

In the present case the plaintiffs were aware of the defalcations on the 6th of April, and they gave notice to the defendants only on the 17th of April, after the flight of Peter Fulton to the United States.

June 25, 1891.]

The Court unanimously confirmed the judgment but for a different reason. The judgment is as follows:—

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"La Cour, etc.....

"Considérant que dès le 6 avril 1885, l'appelante connaissait que le nommé Fulton était défalcataire, et qu'elle n'a prévenu l'intimée que le 17 avril, alors que le dit Fulton avait laissé le pays;

"Considérant que la dite appelante était tenue de prévenir l'intimée plustôt, et qu'elle a manqué à son devoir, vis-à-vis l'intimée, en retardant ainsi; pour ces raisons confirme le jugement de la Cour Supérieure, siégeant à Montréal, le 27e jour de novembre 1889, renvoyant l'action avec dépens, et déboute l'appel avec dépens."

Judgment confirmed.

Carter & Goldstein for appellants.

Greenshields & Greenshields for respondents.

(J. K.)

September 26, 1891.

Coram BABY, BOSSÉ, DOHERTY, CIMON, JJ.

JAMES A. HATHAWAY ET AL.,
(*Claimants in Court below*),
APPELLANTS;

AND

EDWARD CHAPLIN,
(*Contestant in Court below*),
RESPONDENT.

Evidence—Proof of claim—Account sales.

HELD:—Where appellants, by a claim filed upon an estate in liquidation, claimed indemnity for an alleged loss made by them upon shipments of cattle from Boston to Liverpool, that the account sales received by claimants from their Liverpool agents were insufficient, *per se*, to make proof of the loss.

APPEAL from a judgment of the Superior Court, Montreal, (TAIT, J.), May 31, 1890, maintaining the respondent's contestation of a claim filed by the appellants for the sum

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of $7,968, on the estate of the Exchange Bank of Canada in liquidation.

The judgment of the Court below reads as follows:—

"Having heard the parties by their respective counsel upon the merits of the claim filed by James A. Hathaway and others, and of the contestation thereof by said Edward Chaplin, etc.;

"Considering that the said claimants claim that the said Bank is bound to indemnify them for an alleged loss made by them upon two shipments of cattle from Boston to Liverpool, upon steamships "Bavarian" and "Iberian" on the 18th and 25th days of September, 1883;

"Considering that claimants have failed to prove by sufficient evidence that the alleged loss occurred; the only witness examined on that point being Arthur E. Jackson, who has no personal knowledge of such loss, and only testifies thereto from the account sales received by claimants from their Liverpool agents;

"Considering that the said Bank suspended payment on the 15th day of September, 1883, and that the claimants were aware of such suspension, and said cattle had not been shipped when they received the letter of date 14th September, 1883, signed by James U. Craig, and the cheque for $36,375.50; and also when the telegram of the 18th September, 1883, was sent and received by them; and that Thomas Craig, who signed the said telegram, had no authority to give the guarantee which he purports to have given by said telegram, and said Bank is not bound thereby;

"Considering claimants have failed to prove the material allegations of their claim, and that the contestant has proved the material allegations of his contestation;

"Doth maintain said contestation and doth reject and dismiss said claim, and doth enjoin the liquidators of the said Bank not to collocate the said claimants upon any dividend sheet prepared by them, with costs, *distraits*, etc."

The claimants are large stockyard owners and cattle dealers at Boston, Mass., and on the 8th January, 1885,

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filed a claim with the liquidators of the Bank for the sum of $7,965.

The Exchange Bank suspended payment on Saturday, 15th September, 1883, and the winding up order under the provisions of the Winding up Act (45 Vict., cap. 23, Canada) was issued on the 4th December of the same year.

The sworn claim set forth that this sum of $7,965 arises out of the losses on two shipments of cattle, feed, etc., made by claimants from Boston to Liverpool for and at the request of James McShane, of Montreal, which shipments were made under the guarantee of the Bank, and on the face and credit of the Bank's letter of credit issued on the 14th September, 1883, and under all which McShane gave to the claimants his cheque at Boston dated at Boston the 17th September, 1883;

That these shipments were made from Boston, one on 18th Sept. 1883, per S. S. "Bavarian," the loss on which was $4,352.96, and the other on the 25th Sept. 1883, per S. S. "Iberian," the loss on which was $3,612.12, or a total of $7,965. Annexed to the claim there was filed the letter of credit, cheque, and telegram of guarantee referred to. There was also given a statement in detail of the fodder, etc., procured for the cattle, and of the account sales and returns.

The contestation, filed on the 27th January, 1885, averred that there was no liability on the part of the Bank, and that it could not be held by the letter of credit or telegram of guarantee, both of which were beyond the powers of the Bank, were not only not authorized but were signed and given without any authority or knowledge of the bank, and that the parties signing the same had no authority of any kind so to do.

The answer to the contestation denied all this, and set up that in August, 1883, McShane, then a customer of the Bank, with whom he had deposited security, and who were to give him financial assistance, proceeded to Boston with the full knowledge of the Bank, and made arrangements to take the freight space for, and load, with cattle, four steamships leaving Boston in the month of

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September, 1883; that having engaged the space he arranged with the claimants to purchase for him the necessary cattle to fill these four steamships, the claimants to be paid cash by cheque drawn against letters of credit to be given in his favor by the said bank and addressed to claimant: the Bank also gave in August, 1883, a special letter to Messrs. Lincoln and Thayer, agents of the steamship line, becoming responsible for the freight on these four shipments to the extent of $5,000.

The answer then alleged that the first and second shipments were made in due course, the first on the 4th Sept., 1883, the second on the 11th Sept. 1883, in both cases McShane giving claimants a letter of credit in his favor signed by the Bank to claimants to the extent of $40,000, and then McShane giving claimants a cheque for the precise amount of the purchase of the cattle, which was in each case about $39,000 odd; that the cattle for the third shipment were purchased, selected and weighed in presence of Mr. McShane, letter of credit produced and delivered to claimants and cheque given on Monday the 17th Sept. 1883; that then news came the Exchange Bank had suspended; that it was then decided at request of McShane to ship the cattle as the ship was ready to sail on the morning of 18th Sept., 1883, consign them and take proceeds on account; that the necessary cattle had also been previously secured for the fourth shipment for 25th Sept., 1883, and on enquiry at the Bank as to what should be done the telegram referred to was sent by the president of the Bank instructing the shipment and that the Bank would guarantee the loss; that the shipment was made, that it was in the interest of the bank, that they had property and security of McShane, and that the telegram was sent, as also said letter of credit given, in connection with engagements between claimants and McShane in which the Bank had interest and might derive a profit from, and now cannot repudiate a loss.

May 18, 1891.]

J. S. Hall, Q.C., for appellants:—

As to the first *considérant* of the judgment about the

loss, claimants respectfully submit it is not well founded.

(*a.*) The claim filed sworn to, sets it forth in clearness.

(*b.*) The loss is not denied by the pleadings, and there is no general denial. There is but one special contestation in the record, and on examination of it, it will be seen that the points raised by the contestants are the non-liability of the Bank, and that the letters and telegram were beyond its powers, and the parties who signed the same had no right to do so. This the claimants submit is quite clear.

(*c.*) However, on the merits of the loss claimants submit ample proof has been made.

The statements annexed to the claim are composed of several items. First, there is purchase price of the cattle, the ocean fodder, insurance, feed at yards, freight on cars to dock, then credit is given for proceeds as per account sales.

There is no question about the shipment of cattle, their price and other items.

The point raised by the judge is in effect that the return of the account sales is not sufficient, as above stated. This is not pleaded, but claimants submit these account sales or returns are quite sufficient unless specially and expressly denied. Furthermore the cattle were consigned at Mr. McShane's own request and to his own agents, and not to claimant's agents as stated in the judgment. This was and is the customary way of doing. For the courts to refuse acceptance of this system and to require proof of details of loss when not challenged would upset commercial dealings of a very extensive character.

R. A. E. Greenshields for respondent:—

The claimants have wholly failed to prove their claim. The cattle were shipped to England by the claimants, but there is no proof whatsoever of a legal nature in the record to show what price the cattle realized, what the expenses of the shipment were, or any details. The only witness examined is a clerk named Arthur E. Jackson in the employ of the claimants. He knows nothing per-

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sonally about what the cattle realized, and the only knowledge that he has at all is from the accounts or statements which he produces and has filed—none of which statements are in any way proven.

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The judgment was affirmed, upon one ground only, as follows:—

"La Cour, etc.....

"Considérant que les appelants, réclamants en Cour de première instance, n'ont pas prouvé les allégations principales de leur réclamation, et notamment que la perte dont ils demandent le remboursement a été par eux soufferte en tout ou en partie, et qu'en autant il n'y a pas erreur dans le jugement dont est appel;

"Cette Cour, pour la raison susmentionnée, et sans adjuger sur les autres questions soulevées, confirme le dit jugement rendu par la Cour Supérieure à Montréal le 31e jour de mai 1890, avec dépens contre les appelants en faveur du dit intimé;

"*Dissentiente* l'hon. juge Cimon, qui est d'avis d'accorder l'appel avec dépens devant cette Cour, en faveur des appelants contre l'intimé; de maintenir la réclamation des appelants pour $4,352.92, et de la renvoyer pour le surplus, avec dépens en Cour Supérieure en faveur de l'intimé contre l'appelant; et de modifier en conséquence le jugement de la Cour Supérieure."

Judgment confirmed, Cimon, J., diss.

Chapleau, Hall, Nicolls & Brown for appellants.

Greenshields, Guerin & Greenshields for respondent.

(J. K.)

September 26, 1891.

Coram BABY, BOSSÉ, DAVIDSON, CIMON, JJ.

CONNECTICUT FIRE INSURANCE CO.,
(*Plaintiff in Court below*),
APPELLANT;

AND

WALTER KAVANAGH,
(*Defendant in Court below*),
RESPONDENT.

Principal and agent — Fraud — Transfer of fire insurance — Contract—Agent—Powers of—Art. 1735, *C. C.*

The defendant, an insurance broker, was the agent in Montreal of two foreign insurance companies, one of which instructed him to cancel a certain risk in Montreal, which the defendant had accepted. After suggesting a reconsideration, and the order being repeated, he complied, and he then immediately transferred the insurance to the other company for which he was agent, without informing them that the risk had been refused by the first company. He made the transfer, moreover, without the knowledge of the insured and without notice to them. On the same day a fire occurred in the premises insured, and the loss was paid by the company to which the insurance had been transferred. In an action afterwards brought by the latter against the agent, to be reimbursed the amount of the loss, which they alleged they had paid without cause, and upon false representations by the agent:

HELD:—Affirming the judgment of WURTELE, J., M. L. R., 5 S. C. 262, That the transfer of the insurance being made by the defendant in good faith, before the fire occurred, and in accordance with the custom of insurance brokers in Montreal, there was no fraud on his part, and he could not be held liable.

APPEAL from a judgment of the Superior Court, Montreal (WURTELE, J.), Nov. 14, 1889, dismissing the appellants' action, by which they asked that the respondent be condemned to pay and reimburse to them a sum of $2,872.32, which sum they alleged they had paid without cause and under false and fraudulent representations and concealments on the part of the respondent. The

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judgment of the Court below is fully reported in M. L. R., 5 S. C. 262-273.

May 23, 1891.]

S. Bethune, Q.C., and *Marceau*, for the appellants, submitted, first, that the insurance with the Scottish Union & National Insurance Company was not legally cancelled before the fire. The interim receipt of the Scottish Union & National Insurance Company states that the company will indemnify the assured for his loss unless the application be declined by the company, in which case the risk will cease and be of no effect at the termination of 30 days, *or before, if written notice be given the assured by the company to that effect.* This contract was the law of the parties, and the loss having occurred only eight days after it was issued, it is quite clear that the insurance could have been cancelled only by a written notice to Warden King that the company declined to continue the risk, and by paying back to him the unearned premium. Was such notice given, or was even a verbal notice given to Warden King ? The evidence is most positive to the contrary. The respondent admits it himself.

Goodwin v. *Lancashire Fire & Life Ins. Co.*, 18 L. C. J. 1.; *Tough et al.* v. *Provincial Ins. Co*, 20 L. C. J. 168.

Not only was there no notice of cancellation given to the assured, but no portion of the unearned premium paid by him was ever refunded, or offered to be refunded, to him. By reference to the form of policy of the Scottish Union Company, it will be seen that the cancellation of a policy by the company required not only the giving of notice to the assured, but also the "refunding or tender-"ing to the assured of a ratable proportion of the pre-"mium for the unexpired term of the policy."

Secondly, no insurance was ever legally effected with the company, appellants.

No notice of cancellation of the insurance in the Scottish Union & National Insurance Company was given to Mr. King before the fire, nor was Mr. King's consent obtained to place the risk in the company, appellants. The respondent and his chief clerk, Mr. Stanger, state that all

they did was, on the morning of the fire, the 14th July, 1888, to enter in the books of the Scottish Union & National Insurance Company, opposite the entry of the risk, that it had been ordered cancelled, and to write out a Daily Report of the same risk to the company appellants, and enter the insurance in their books; and they contend that is all that it was necessary to do to operate a valid transfer of the insurance from one company to the other. The respondent has produced witnesses to prove a practice on that point. These witnesses state that it is customary for an agent representing two or more companies, when he is ordered to cancel a risk in one company, to mark it cancelled in the books, and to place it in another company immediately, and not to wait until he has notified the assured of the cancellation of his risk and taken up the interim receipt of the cancelling company; they further say, that after that is done, they exchange the interim receipts.

Whatever may be the practice stated to exist, it cannot have any bearing upon the case. A practice contrary to law, even if it was universal, must be and is considered by all the writers as an abuse which cannot overrule the law. Practice or custom is sometimes sanctioned by Courts of Justice, in matters of commerce where no special text of law exists to regulate the matter, but never otherwise.

In this case, the contract of insurance between the Scottish Union & National Insurance Company and the respondent, which is the law of the parties, states that the contract could be annulled only by giving the respondent a written notice and by refunding to him the unearned premium; and concerning the insurance in the company appellants, the elementary principle is that there is no contract without consent.

We must conclude that the insurance of the Scottish Union & National Insurance Company was never legally cancelled, and no contract ever legally entered into on behalf of the company appellants.

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Lancashire Fire Insurance Co. v. *Nill*, 16 Insurance Law Journal, p. 309.

This case was decided by the Supreme Court of Pennsylvania, as late as 1886. The facts are exactly similar to those of the present case, and the Court had no hesitation in saying that the Lancashire Company, in which the insurance of Nill had been transferred without his consent or knowledge from the Clinton Company, was not liable for the loss, and that the action of the agent in inducing the assured to collect his loss from the Lancashire Company *was a fraud upon the Company.* The following synopsis heads the report of the case :—

"N. had insured a mill through B. in the Clinton Com-
"pany. On August 9th the mill was burned down; on
"the 10th N. notified B. of the loss, who then telegraphed
"N. to come to his office, where he informed him that on
"August 1 the Clinton Company had ordered the policy
"on the mill cancelled, and that he, B., had placed the
"risk with the Lancashire Company, for which he was also
"the local agent. N. objected to surrendering his Clinton
"policy, but was induced to do so on the representation
"of B. that the Lancashire Company was good and safe.
"Proof of loss was made to the Lancashire Company, and
"suit brought to recover the insurance. The Supreme
"Court, reversing the Court below, held, that it was
"error to have permitted the case to go to the jury; that
"under the plea of *non est factum* there was no evidence
"of the execution and delivery of the policy, that no con-
"sideration had passed, and that the action of B. was a
"fraud on the defendant company, that the Clinton policy
"was valid up to the time when B. induced N. to sur-
"render it, and therefore there could have been no trans-
"fer of the risk until after the 9th, when the fire took
"place."

Another contention of the respondent is that he is an insurance broker, and that as such he has the right to act as agent of Warden King concerning this insurance.

The broker is thus defined by art. 1735 of the Civil Code: "A broker is one who exercises the trade and cal-

"ling of negotiating between parties the business of "buying and selling, or any other lawful transaction. He "may be the mandatary of both parties, and bind both "by his acts in the business *for which he is engaged by* "*them.*"

In this instance, the respondent was not the mandatary of both parties; he was not engaged by them to transact any business between them. He was simply the agent of the company appellants, and King, the assured, had never requested him to act in his behalf. Besides, he was the constituted agent of the company appellants who had contracted with him for all his skill and ability. In any transaction where his principal was one of the parties he could not act as agent of the other. No one can serve two masters, and an agent cannot accept any adverse interest to his principal. If such a thing was permitted, it would open the door to all sorts of fraud; there would be no protection or security in contracts, and principals would be completely at the mercy of dishonest agents.

May on Insurance, p. 137, § 125.

Angell on Fire Insurance, p. 509, § 467.

Wharton, Commentaries on Principal and Agent, § 56.

Dunlap's Paley on Agency, p. 33, § 33 and note.

Story on Agency, § 28, 31, 210, 211 and 213.

Parsons on Contracts, vol. I, p. 86.

Utica Fire Ins. Co. v. *Toledo Ins. Co.*, 17 Barbour's Rep. 132.

New York Central Ins. Co. v. *National Protection Ins. Co.*, N. Y. Rep. 85.

Third. The respondent acted unfaithfully towards the appellants, and the appellants, by the false representations and concealments of the respondent, were induced to pay an amount for which they were not legally liable.

The contract of agency or mandate is essentially one of trust and confidence. The principal who appoints an agent to represent him must necessarily confide to his honesty and integrity. The agent who accepts the position of trust and confidence must act with diligence

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and all the care of a prudent man ; he stands in the stead of his principal who is acting personally through him ; he is bound to use in his dealings with his principal the utmost good faith (*uberrima fides*), and one of his most imperative duties, a duty which, we might say, is the basis, the *raison d'être*, of his appointment, is to inform his principal of all facts or circumstances within his knowledge which may be advantageous or prejudicial to his interest.

C. C. Art. 1709-1710.

Bédarride, du Dol et de la Fraude, Vol. II, No. 1226. Troplong, du Mandat, Vol. IV, p. 383, No. 396.

Story on Agency, 9th ed., § 208, p. 237.

C. J. Doherty, Q.C., and *H. J. Kavanagh*, for respondent:

When at the trial of this action it was shown that the respondent could not be reproached with anything bearing the slightest appearance of fraud, the appellants argued that there was *legal fraud.* Their argument was that until the assured was notified of the cancellation in the Scottish, that company was liable, and there was fraud on the part of the respondent not to have stated in the *Daily Report* the fact of the previous insurance in the Scottish, and that its cancellation had not been notified to King. They contended also that the new contract in the Connecticut was without effect because it wanted the consent of King, and they urged that there was further fraud on the part of respondent, when reporting the transaction, in failing to state that King had not applied for such insurance. Well, rightly or wrongly, respondent believed that the Scottish insurance was at an end, and he also believed that it was not necessary to inform them that King had not applied specially for insurance in the Connecticut. If, however, he erred in this, his error as to what should be done by an agent under such circumstances was shared by the whole insurance community ; it was at most an error of law.

The respondent is accused, in this action, of fraud committed after the fire .

1st. In having delayed telegraphing. But the accusation is completely disposed of by the proof.

2nd. In not mentioning, in the telegram reporting the loss, the day and hour of its occurrence. But it is shown that such a thing was never done and was never required; and it is manifest that even if he had done so the appellants would have paid the loss just the same, for they were informed by affidavit of the precise hour of the fire, and it was on this information that they paid.

Neither before nor after the fire, nor at any time, was there any fraud attributable to respondent. And as to the argument by which appellants attempt to construe *legal fraud* out of what happened, were they strictly correct in their contention that the absence of King's participation at the time prevented the Scottish cancellation and the Connecticut insurance—even were this so, it is submitted that King's subsequent ratification of both had the effect of making cancellation and insurance—the transfer, in fact—perfectly valid.

In this connection it is also to be remarked that respondent was not only the agent of the particular insurance companies he represented; he was and is also an insurance broker, and as such his business was to act for insured and insurer, and his action in placing the risk for King in the Connecticut after the cancellation by the Scottish, even if there were no express authorization by the insured, was at all events that of a "*negotiorum gestor*," whose action benefited and was accepted and ratified by him for whom he acted.

The mere retaining by King of the Scottish receipt could not have prevented the transfer, had King previously consented to it,—and his ratification is equivalent to such prior consent.

As to the pretention urged by appellants, that the insurance could not be ratified after the loss, respondent refers to the following authorities:—

"Where a policy of marine insurance is made by one "person on behalf of another, without authority, it may "be ratified after the loss of the thing insured, by the "party on whose behalf it was made, though he knew "of the loss at the time of the ratification." (*Williams* v.

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North China Ins. Co., 1 *C. P. Div.* 757, and 35 *L. T. N. S.* *p.* 884, cited in *Evans, on Principal & Agent, Vol.* 1, *p.* * 108, *Blackstone Edit.*)

The same has been held in Canada in the case of fire insurance — *Gifford* v. *Queen Ins. Co.*, 1 *Hannay* (*New Brunswick*) 432, and *Ogden* v. *Montreal Fire Co.*, 3 *U. C., C. P.* 497, cited in *Porter on Insurance, p.* * 438, *Blackstone Edit.*

Nov. 26, 1891.]

The Court unanimously dismissed the appeal.

Judgment confirmed.

Duhamel, Marceau & Merrill for appellants.

H. J. Kavanagh for respondent.

(J.K.)

May 23, 1890.

Coram DORION, C.J., CROSS, BABY, CHURCH, BOSSÉ, JJ.

COMMISSAIRES D'ÉCOLE POUR LA MUNICIPALITÉ DE LA PAROISSE DE STE-VICTOIRE,
(*Defendants in Court below*),
APPELLANTS;

AND

PIERRE PAUL HUS,
(*Plaintiff in Court below*),
RESPONDENT.

Mandamus—Establishment of new school district—School visitors—Superintendent of education—Jurisdiction upon appeal—Approval of three visitors—40 *Vict.* (*Q.*), *c.* 22, *s.* 11 —*R. S. Q.* 1951, 2055.

On an application by H. for a writ of *mandamus* to compel the appellants to establish a new school district, in accordance with the terms of a decision rendered on appeal by the superintendent of education, under 40 Vict. (Q.) ch. 22, s. 11, the appellants pleaded, *inter alia*, that the superintendent had no jurisdiction to make the order, the petition in appeal to him not having been approved of by three qualified visitors.

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HELD:—That inasmuch as one of the visitors who signed the petition in appeal to the Superintendent, was the parish priest of an adjoining parish, and inasmuch as under R. S. Q. 1951, priests and ministers can be visitors only for the municipality in which they reside, the petition in appeal had not the approval in writing of three qualified visitors, and the decision rendered by the superintendent was null and void.[1]

APPEAL from a judgment of the Superior Court, district of Richelieu (OUIMET, J.), April 4, 1889. The following observations of the learned judge in rendering judgment explain the case:—

OUIMET, J.:—

Certains contribuables de l'arrondissement No. 6, de la paroisse de Ste-Victoire ont, par requête, sollicité les commissaires d'école de leur municipalité de former un nouvel arrondissement, donnant pour motif, que leurs enfants, au nombre d'une cinquantaine, en état de fréquenter l'école, éprouvent de graves inconvénients à fréquenter l'école de leur arrondissement, à cause de l'éloignement de leur domicile de la maison d'école, de l'obligation de traverser une forêt, et des inondations le printemps et à certains temps de l'année, du chemin par où il leur faut passer. En raison de ces inconvénients, les commissaires, les années précédentes, leur avaient permis de fréquenter l'école du village, mais la maîtresse, vu l'accroissement du nombre d'élèves, ayant demandé $25 d'augmentation de salaire, les commissaires ont refusé de voter ce petit surplus et ont ordonné aux enfants susdits de l'arrondissement No. 6, de retourner à leur école. De là, demande d'une douzaine de contribuables aux commissaires, de former un nouvel arrondissement, pour cette partie de l'arrondissement No. 6, dont les habitants éprouvent les inconvénients sus-mentionnés à envoyer leurs enfants à l'école de cet arrondissement.

Refus des commissaires par résolution du 1er octobre dernier (1888).

Appel par requête sommaire des contribuables pétition-

[1] Confirmed by the Supreme Court, 15 Leg. News, 41.

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naires au surintendant, le priant de leur accorder l'arrondissement demandé.

Cette requête a été approuvée, tel que voulu par la loi, par trois et même quatre visiteurs d'école, savoir : par le Révd. Messire Noiseux, curé de Ste-Victoire, le Révd. Messire Désorcy, curé de St-Ours, (désigné par erreur dans la sentence comme résidant à Ste-Victoire) par l'hon. J. A. Dorion, conseiller législatif pour la division de Richelieu, et par M. Lippens, visiteur-général d'écoles pour la province.

Sur cette requête, le surintendant a, le 20 octobre dernier, rendu une sentence, qui a été signifiée aux commissaires d'école de Ste-Victoire, leur enjoignant :—1o. d'ouvrir immédiatement une école temporaire dans un local qui leur serait offert par les contribuables intéressés, dans l'arrondissement projeté ; 2o :—de former dans leur municipalité scolaire un nouvel arrondissement sous le No. 7, devant inclure les contribuables qui souffraient de l'état de chose alors existant ; 3o :—enfin, de construire, sous le délai d'un an, une maison d'école dans les limites du nouvel arrondissement No. 7.

Les commissaires d'école de Ste-Victoire ont refusé d'obéir ; de là un *mandamus* de la part du requérant Pierre Paul Hus, un des contribuables intéressés pour contraindre les commissaires à exécuter la sentence du surintendant du 20 octobre dernier.

A cette action les commissaires plaident : 1o :—qu'ils ne sont pas justiciables du surintendant pour le cas actuel, et que ce dernier n'a pas d'autorité pour leur imposer un nouvel arrondissement ; 2o :—que du reste le surintendant n'a pas procédé avec les formes voulues par la loi, attendu qu'il n'a pas assigné les commissaires à comparaître devant lui pour donner leurs raisons à l'encontre de la requête d'appel ; qu'il a procédé *ex parte* à prendre connaissance de la demande des contribuables, et à rendre sa sentence ; et que l'appel de ces derniers n'était pas autorisé par trois visiteurs d'école, tel que voulu par la loi ; l'un des trois sus-nommés qui ont autorisé et approuvé la requête d'appel, résidant dans la paroisse de

St-Ours, et non dans la paroisse de Ste-Victoire, tel que faussement énoncé dans la sentence ; 3o :—que la formation d'un nouvel arrondissement serait une injustice pour la paroisse de Ste-Victoire.

Le requérant, Pierre Paul Hus, a répondu à cette défense que le surintendant avait par la loi le pouvoir de rendre la sentence du 20 octobre dernier ; qu'il n'était astreint en pareil cas à aucun procédé particulier, étant autorisé par la loi à procéder sommairement ; et que l'acte requis de lui, n'étant que l'exercice de son pouvoir général d'administrer les écoles et de son contrôle absolu sur les décisions des commissaires d'école, était entièrement de sa discrétion ; que sa sentence est finale à toutes fins quelconques ; que lui seul a le pouvoir de l'amender ou la changer, et que les commissaires sont tenus en loi de l'exécuter suivant sa forme et teneur.

De la part du requérant, il est prouvé, par des admissions des parties, que la sentence du surintendant a été signifiée aux commissaires, intimés ; que le requérant et les autres contribuables intéressés ont offert un local convenable pour tenir temporairement l'école dans le nouvel arrondissement No. 7, jusqu'à ce que la maison d'école à être construite, soit érigée ;

De la part des intimés, il est prouvé par témoin que Messire Désorcy, un des quatre visiteurs qui ont approuvé la requête d'appel, est prêtre et le curé desservant de la paroisse de St-Ours, mais ne réside pas à Ste-Victoire, ainsi que erronément énoncé dans la sentence. On n'a pas cherché à prouver qu'il n'était pas visiteur d'école, par certaines qualifications personnelles qu'il pourrait avoir, car la loi reconnaît comme visiteurs d'écoles différentes personnes pouvant résider n'importe où dans les limites de la province, et qui sont qualifiées comme visiteurs d'école par le fait de leur dignité. On s'est contenté de prouver le fait simple que Messire Désorcy est curé de St-Ours et qu'il ne réside pas à Ste-Victoire.

Par la première raison de leur défense, les intimés prétendent que l'article 2055 des Statuts Refondus de Québec

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ne prévoit pas le cas actuel, comme sujet à l'appel devant le surintendant, c'est-à-dire lorsque les commissaires refusent d'accéder à une requête demandant un nouvel arrondissement, mais prévoit seulement les cas, où il y a résolution des commissaires pour changer et modifier les arrondissements existants.

D'après la loi le surintendant est le chef du département de l'instruction publique, qui est un département civil ; comme tel, il a jurisdiction sur toutes les décisions des commissaires concernant la formation et le maintien des écoles dans les diverses municipalités, et concernant leur administration des affaires scolaires généralement dans chaque municipalité. Il a un contrôle absolu sur tous les actes d'administration des commissaires, ayant pour fin l'établissement et le maintien des écoles et de tout ce qui concerne leur tenue et leur direction. Ceci est rendu évident à la simple lecture de la loi concernant l'instruction publique, dont un grand nombre de dispositions affirment son autorité, et cette prérogative est clairement confirmée, pour le cas actuel, au 2me paragraphe de l'article 2055, St. Ref. Québ., qui donne au surintendant le pouvoir de rendre des sentences en dernier ressort tendant à enjoindre aux commissaires "de "faire ce qui leur a été demandé par les contribuables ou "ce qu'il leur ordonne de faire ; de s'abstenir (eux les "commissaires) de faire ce qui leur est demandé par les "contribuables ; ou qu'ils (les commissaires) ne fassent ce "qui leur est demandé (par les contribuables) qu'en tout "ou en partie, et aux conditions exigées par la sentence."

Si la première partie de cet article 2055 laissait du doute sur la jurisdiction du surintendant dans le cas de refus des commissaires de former un nouvel arrondissement, la dernière partie suscitée enlèverait ce doute, car elle rencontre tous les cas et confère au surintendant les pouvoirs les plus amples concernant l'établissement, la formation et le changement d'arrondissement d'école.

Du reste, cette section 2055 est la reproduction de la section 11 du chap. 22, 40 Victoria. On sait que les Statuts Refondus ne doivent pas opérer d'amendement à la

loi existante ; qu'ils ne font que la reproduire et la déclarer telle qu'elle existe. Ainsi le veut la section 8 de l'acte provincial relatif aux Statuts Refondus. Or si on réfère à la section 11, chapitre 22, 40 Victoria, reproduite à l'article 2055 des Statuts Refondus que nous discutons, nous voyons que la phraséologie est différente de celle de l'article 2055, et que cette section 11 donne clairement jurisdiction au surintendant pour le cas de refus des commissaires de créer de nouveaux arrondissements comme pour tous les autres cas où il s'agit d'arrondissements. Cette première raison est donc mal fondée et doit être rejetée.

La deuxième raison des intimés concernant la procédure à suivre par le surintendant sur un appel du genre de celui qui nous occupe, n'est pas mieux fondée.

Les intimés disent que l'appel n'a pas été autorisé légalement, parce que Messire Désorcy, un des trois visiteurs qui l'ont approuvé, ne réside pas à Ste-Victoire, ainsi qu'allégué par erreur dans les procédés d'appel, et que conséquemment, le surintendant a procédé illégalement sur l'appel.

La formalité de l'approbation de l'appel par trois visiteurs d'école peut être essentielle, d'après 2055 des Statuts Refondus de Québec, mais la loi n'exige pas que ce soit des visiteurs résidant dans la municipalité. Rien dans le dossier ne fait voir que Messire Désorcy, bien que résidant à St-Ours, ne soit pas un visiteur d'école. Il peut avoir la qualification que la loi donne à différents dignitaires pour être visiteurs d'école.

La sentence du 20 octobre affirme qu'il est visiteur, et jusqu'à preuve du contraire, cette Cour ne peut mettre de côté l'affirmation de la sentence.

Du reste, la requête d'appel est aussi approuvée par M. Lippens, qui a jurisdiction comme visiteur-général d'école, et cela suffit pour couvrir le défaut invoqué, si défaut il y a, et rendre l'appel légalement autorisé.

Cette dernière raison des intimés est donc encore mal fondée.

La troisième raison des intimés, tirée du défaut de la

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procédure, repose sur le fait que le surintendant a procédé sans assigner les intimés.

L'article 2055 des Statuts Refondus de Québec suscité, ordonne de procéder *sommairement* et n'organise aucune procédure de nature quelconque pour instruire tel appel. Si le législateur eut voulu l'assignation des commissaires, il aurait créé une disposition à cet effet. Il est évident que cet appel n'est pas organisé comme procédé judiciaire et de jurisdiction contentieuse.

Les commissaires ont une entière discrétion pour accorder ou rejeter des demandes de la nature de celle faite par le requérant et les autres contribuables du nouvel arrondissement. Pourquoi le surintendant qui est leur supérieur ou leur chef, n'aurait-il pas la même discrétion ?

La loi ne crée pas un tribunal judiciaire pour décider de pareilles questions ; elle ne constitue pas le surintendant juge d'un litige, mais juge discrétionnaire de l'opportunité de faire ou de ne pas faire un simple acte d'administration, à propos de la tenue et de la direction des écoles dans les municipalités. Les intimés arguent de la section 1889, Stat. Ref. Québec, que le surintendant doit par lui-même ou par ses délégués, faire des enquêtes, lorsque c'est nécessaire, à raison de différents soulevés au sujet des écoles et des maisons d'école.

Cela est vrai jusqu'à un certain point, mais ces enquêtes ne sont pas ordonnées ; elles sont seulement autorisées pour aider le surintendant à régler plus avantageusement les difficultés qui peuvent se soulever dans les municipalités scolaires ; lui seul a la discrétion de juger de l'opportunité de ces enquêtes ; il ne doit user de cette discrétion qu'avec réserve, car s'il fallait des enquêtes à toutes les difficultés, il faudrait prendre sur les fonds alloués aux écoles les frais de ces enquêtes, et ainsi l'argent voté pour aider l'éducation serait en grande partie absorbé pour des frais ; ce n'est pas là le but de la loi. Le surintendant est le chef du département des écoles, avec pouvoir de contrôler les actes d'administration des commissaires d'école, et ce contrôle s'exerçe sommairement, sans formes judiciaires ou contentieuses. C'est pourquoi la loi

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à l'article 2056 des Stat. Ref. de Québec veut que les sentences du surintendant soient finales : sauf à ceux qui en souffrent de s'adresser à lui-même pour faire changer, révoquer ou modifier ses décisions au besoin ; mais le surintendant seul a le pouvoir de toucher aux sentences ou décisions qu'il rend. Cette troisième raison de la défense n'est pas plus valable que les autres et doit aussi être rejetée.

Les intimés allèguent en quatrième lieu que la formation du nouvel arrondissement No. 7 serait commettre une injustice. Cette Cour n'a pas à examiner cette question qui est du ressort exclusif du surintendant.

Les raisons alléguées dans la requête des contribuables pour demander un nouvel arrondissement lui ont été soumises. A lui seul de juger si elles étaient ou non suffisantes pour octroyer la demande.

Les principes ci-dessus énoncés et l'interprétation donnée par cette Cour à la loi des écoles ont reçu leur sanction dans un précédent de la Cour Suprême, dans la cause de *Tremblay* v. *Commissaires d'école de la paroisse de St-Valentin*, rapportée au 12e vol. des Rapports de la Cour Suprême, page 546.

Dans cette cause les commissaires avaient d'abord déclaré qu'ils se soumettraient à la sentence du surintendant, mais ensuite, adoptèrent des résolutions tendant à l'annuler ou à l'éluder.

Les contribuables intéressés demandèrent et obtinrent un bref de *mandamus* qui fut maintenu par la Cour Supérieure, rejeté par la Cour d'Appel, mais rétabli et maintenu dans son intégrité par la Cour Suprême.

Et voici ce que disait l'honorable juge Taschereau, un de ceux qui ont siégé dans la cause ; à propos de la conduite des commissaires qui refusaient d'exécuter la sentence du surintendant dans sa forme et teneur ;

"That is not, in my opinion, how should be received " the orders of a high officer of the State, whom, *very pro-* " *perly indeed*, the law has declared should be the *sole* " *arbiter of these dissensions amongst school rate-payers. His* " *decrees must be respected and obeyed* as those of a Court of

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"justice should be, and the refusal or negligence to do so "is nothing else but *an act of rebellion to law and authority.*"

Cette Cour serait tenue de se soumettre quand même à une jurisprudence établie d'une manière aussi positive par le plus haut tribunal du pays, mais nous devons déclarer que nous concourons pleinement dans les opinions des honorables juges de la Cour Suprême telles que consignées dans le rapport de cette cause des commissaires de St-Valentin.

Il nous semble que la loi sur la matière n'est pas susceptible d'une interprétation différente.

La Cour, en conséquence, maintient la requête; et ordonne l'émanation d'un bref péremptoire de *mandamus* enjoignant aux intimés d'exécuter la sentence du surintendant du 20 octobre dernier; et, au cas de refus, les condamnent à $2,000 d'amende, et aux dépens dans tous les cas.

The judgment of the Court below was as follows:—

"La Cour, parties ouïes par leurs avocats sur le mérite de cette cause, examiné la procédure, la preuve et le dossier;

"Considérant que la section 2055 des Statuts Refondus de la province de Québec, décrète ce qui suit:

'Lorsque l'emplacement d'une maison d'école est choisi 'par les commissaires ou les syndics; qu'un changement 'est fait dans les limites d'un arrondissement d'école; 'qu'un nouvel arrondissement est établi dans une muni- 'cipalité scolaire; qu'un ou plusieurs arrondissements éta- 'blis sont changés ou subdivisés; ou lorsque les commis- 'saires ou les syndics refusent ou négligent d'exercer ou 'remplir quelqu'une des attributions ou quelqu'un des 'devoirs que leur confèrent les articles 2032, 2049, 2050, '2051, 2052, 2053 et 2054; les contribuables intéres- 'sés peuvent en appeler, en tout temps, au surinten- 'dant, par requête sommaire; mais cet appel n'a lieu 'qu'avec l'approbation, par écrit, de trois visiteurs autres 'que les commissaires ou les syndics d'école de la muni- 'cipalité;

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'Dans sa sentence, qui est finale, le surintendant peut 'ordonner que les commissaires ou les syndics fassent ce 'qui leur a été demandé ou ce qu'il leur ordonne de faire, 'ou s'abstiennent de le faire, ou ne le fassent qu'en tout 'ou en partie, et aux conditions exigées par la sentence.' 40 V., c 22, s. 11.

"Considérant qu'en vertu de la dite section 2055 suscitée, il y avait appel, par requête sommaire, au surintendant de l'éducation pour la province de Québec, de la décision rendue le 1er octobre 1888, par les commissaires d'école pour la municipalité de la paroisse de Ste-Victoire, dans le comté de Richelieu, à savoir, les défendeurs dans la présente cause, refusant et rejetant la demande et requête à eux faites, le dit jour, 1er octobre 1888, par certains contribuables de la dite municipalité scolaire, demandant l'établissement d'un nouvel arrondissement d'école, et ce pour les raisons mentionnées en la dite requête produite en cette cause comme exhibit No. 1, par les dits défendeurs ;

"Considérant qu'en vertu du paragraphe 2 de la dite section 2055 S. R. Q. le surintendant peut ordonner que les commissaires, ou les syndics fassent ce qui leur a été demandé en vertu de la dite section (voir aussi 40 Vict., chap. 22, section 11), ou ce qu'il ordonne de faire, et aux conditions exigées par sa sentence ;

"Considérant qu'en loi, la sentence rendue par le surintendant de l'éducation est finale ;

"Considérant qu'il est en preuve qu'un appel, suivant les formalités voulues par la loi, a été fait le 5e jour d'octobre 1888, au dit surintendant de la dite décision des dits défendeurs, du dit jour, 1er octobre 1888 ;

"Considérant qu'il appert que le dit surintendant de l'éducation a rendu sa sentence sur le dit appel, le 20e jour d'octobre 1888, maintenant la dite requête en appel, annulant la résolution des dits commissaires, du 1er octobre 1888, et ordonnant qu'il soit formé un arrondissement sous le No. 7 dans la dite municipalité de Ste. Victoire, dans les limites mentionnées en la dite sentence, dont copie est produite en cette cause par le dit deman-

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deur-requérant, comme son exhibit No. 2, et fixant le site de l'école du dit arrondissement sur celui de l'ancienne école, près du pont qui traverse la rivière du Pot-au-beurre, près de la résidence de Pierre Paul Hus ; et ordonnant qu'elle soit construite suivant la loi et les règlements scolaires, du 20 octobre 1888, au 1er septembre 1889, et qu'en attendant il soit ouvert une école, sans délai, dans un local qui sera fourni aux commissaires par les intéressés du dit arrondissement No. 7, afin que les enfants du dit arrondissement puissent la fréquenter pendant le reste de la présente année scolaire ;

"Considérant qu'il appert à la face même de la dite sentence du dit surintendant de l'éducation, que toutes les formalités voulues par la loi, sur tel appel, ont été remplies, et notamment que le dit appel a eu lieu avec l'approbation par écrit de trois visiteurs d'écoles, exigée par la dite section 2055 des dits Statuts Refondus de la province de Québec ;

"Considérant que par les sections 1863 et 1864 des dits Statuts Refondus, tout document original ou copie, signé ou certifié par le surintendant de l'instruction publique, ou par un secrétaire du département de l'instruction publique, est authentique et fait preuve *prima facie* de son contenu ;

"Considérant qu'un document ou acte authentique ne peut, en vertu de l'article 1211 du Code Civil du Bas-Canada, être contredit que de la manière prescrite par le Code de Procédure Civile, et non autrement, et qu'en vertu de l'article 1234 du dit Code Civil, la preuve testimoniale ne peut être admise dans aucun cas, pour contredire ou changer les termes d'un écrit valablement fait ;

"Considérant qu'en vertu de la section 2056 des dits Statuts Refondus de la province de Québec, le surintendant seul peut changer, révoquer ou modifier toute décision par lui rendue, sur appel de la décision des commissaires ou des syndics, en vertu de l'article 2055 des dits Statuts Refondus ;

"Considérant que le surintendant de l'éducation, sur l'appel en question, a agi dans les limites de sa juridic-

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tion, et avait le pouvoir d'établir l'arrondissement No. 7, et que sa sentence, qui est finale, doit être exécutée par les défendeurs ;

"Considérant qu'il est en preuve par les admissions produites au dossier par les parties en cette cause, que la dite sentence a été signifiée aux défendeurs, et que le requérant ainsi que les autres intéressés du dit arrondissement ont offert aux dits défendeurs un local convenable dans les limites du dit arrondissement No. 7, pour la tenue d'une école temporaire, telle qu'ordonnée par la dite sentence, et que les défendeurs ont toujours refusé et refusent encore d'exécuter la dite sentence et de s'y soumettre ;

" Considérant que le demandeur requérant a prouvé les allégations essentielles de sa requête, et de ses réplique et réponse à l'encontre des défenses produites par les dits défendeurs, et que ces derniers n'ont pas prouvé leurs dites défenses ;

" Maintient la dite requête du dit requérant demandeur, ainsi que ses dites réplique et réponse ;

" Renvoie les dites défenses, et a ordonné et ordonne qu'il émane de cette Cour un bref de *mandamus* péremptoire, enjoignant aux défendeurs à savoir : les commissaires d'école pour la municipalité de la paroisse de Ste-Victoire, dans le comté de Richelieu, d'exécuter la dite sentence de l'honorable Gédéon Ouimet, surintendant de l'éducation dans la province de Québec, en date du 20 octobre dernier, (1888), savoir : 'leur enjoignant de former 'un arrondissement d'école sous le No. 7, dans la dite mu- 'nicipalité de la dite paroisse de Ste-Victoire, dans le 'comté de Richelieu, dans les limites suivantes : la partie 'du rang du nord de la rivière du Pot-au-Beurre, depuis 'Colbert St-Martin, occupant du No. 295 du cadastre in- 'clusivement, jusque chez Louis Lavallée, occupant du 'No. 316 du cadastre, aussi inclusivement, et dans le 'rang au sud de la dite rivière du Pot-au-Beurre depuis 'François-Xavier St-Martin, occupant du No. 346 du 'cadastre inclusivement, jusque chez Pierre Paul Hus, 'occupant du No. 334 du cadastre inclusivement,' de fixer le site de l'école du dit arrondissement sur celui de l'an-

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cienne école, près du pont qui traverse la rivière du Pot-au-Beurre, près de la résidence de Pierre Paul Hus, et d'ouvrir une école dans le local à eux fourni par le requérant ou les intéressés du dit arrondissement No. 7, tel qu'admis comme susdit, afin de permettre aux enfants du dit arrondissement de fréquenter telle école pendant le reste de la présente année scolaire, seules parties de la dite sentence du 20 octobre 1888, présentement exécutoires, le tout sous quinze jours de la signification du présent jugement; si non, et faute par les dits défendeurs de se conformer au dit jugement dans le dit délai;

"Condamne les dits défendeurs, à savoir: les commissaires d'école pour la municipalité de la paroisse de Ste-Victoire, dans le comté de Richelieu, à payer au dit requérant demandeur une amende de $2,000 courant, et a condamné et condamne les dits défendeurs aux dépens. Cette Cour réservant au dit requérant, et à qui il appartiendra, le droit de faire valoir, le cas échéant, toutes autres parties des conclusions de la dite sentence du 20 octobre 1888, du dit surintendant de l'éducation."

Jan. 16, 1890.]

Geoffrion, *Q.C.*, and *Brousseau*, for appellants:—

Les moyens des appelants contre la demande en *mandamus* de l'intimé, et contre le jugement *a quo*, qui lui a accordé sa demande, sont au nombre de trois:—

1o.—Défaut des formalités essentielles à l'exercice de l'appel, qui a donné lieu à la sentence du surintendant de l'éducation;

2o.—Défaut de juridiction du surintendant dans la matière;

3o.—Affectation illégale au demandeur requérant de la pénalité imposée ($2,000) par le dit jugement.

I. La loi qui établit cet appel (S. R. B. C. 1861, cap. 15, sec. 64, ss. 8, amendée par 40 Vic., cap. 22, sec. 11, et S. R. P. Q. 1888, art. 2055) prescrit formellement que tel appel "*n'a lieu qu'avec l'approbation, par écrit, de trois visiteurs...*"

Dans l'espèce, l'approbation au bas de la requête d'appel est *signée* seulement par Messieurs "Jos. Noiseux, ptre.

curé," "O. Désorcy, ptre. curé," et "J. A. Dorion, M. C. L."; et la sentence définissant les qualités respectives les constituant *visiteurs* et les autorisant comme tels à approuver cet appel, qualifie les deux premiers: — "Prêtres, tous deux *résidents* à Ste-Victoire," et le dernier:—"conseiller législatif."

D'après l'art. 1951, S. R. P. Q. ss. 2, les prêtres catholiques sont des *visiteurs* des écoles de la municipalité où ils résident *seulement*.

Etant établi que Messire Désorcy n'a jamais résidé à Ste-Victoire, étant depuis plusieurs années curé de St-Ours, paroisse voisine, il est évident qu'il n'était pas *visiteur* pour la municipalité de Ste-Victoire, dont il s'agissait, et que le surintendant a été mal informé ou s'est mépris en lui attribuant la qualité de prêtre résident, et en le considérant comme *visiteur* qualifié à approuver l'appel de l'intimé et de ses co-requérants.

A l'audition en première instance, l'intimé a prétendu réfuter cette objection, en soutenant que la sentence qui affirme que Messire Désorcy est *visiteur*, étant un document authentique, ne peut être contredite que sur inscription en faux, et non par une preuve orale, fondant cette prétention sur les arts. 1863 et 1864 S. R. P. Q. et 1211—1234 C. C. Nous regrettons de constater que la Cour inférieure, par son jugement, ait maintenu cette prétention. Les arts. 1863 et 1864 du statut n'attribuent d'autre vertu probante à ces documents que celle d'une "preuve *primâ facie*." L'art. 1210 C. C. dit que "*l'acte authentique* fait preuve complète, *entre les parties*." L'art. suivant, 1211, limitant la contradiction de *l'acte authentique* au recours en inscription de faux, ne s'applique évidemment qu'aux *parties* à tel acte, à un *contrat*, et non aux documents officiels, qui ne font qu'une preuve *prima facie* des faits qu'ils énoncent.

Merlin, *vo.* "Preuve," p. 413, 1re et 2e col. bas,—p. 414, 1re col. haut et milieu.

1 Pigeau, pp. 225 et 226.

1 Thomine Desmazures, pp. 382 et 383.

Pothier, "Obligations," Nos. 735 *et seq.* pp. 401—2—3.

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L'intimé a aussi prétendu que, malgré la preuve de non résidence, l'on devait encore présumer, jusqu'à preuve contraire, vu l'affirmation de la qualité de *visiteur* que comporte la sentence, que Messire Désorcy possédait cette qualité sous quelqu'une des autres conditions énumérées à l'art. 1951, S. R. P. Q.

Outre que la fausse condition de *prêtre résident* mentionnée à la sentence comme qualificatif de Messire Désorcy, y est évidemment exprimée pour justifier de sa prétendue qualité de *visiteur*,—il suffit de lire l'énumération des conditions requises des *non résidents* pour être visiteurs *ex officio*, à l'art. 1951, et des personnes formant partie du conseil de l'instruction publique à l'art. 1893, etc., pour se convaincre que la condition de curé desservant de St-Ours est incompatible avec aucune de ces autres conditions.

Les appelants défendeurs ayant allégué et prouvé que la condition de *prêtre résident*, la seule apparaissant à la sentence pouvant justifier de la prétendue qualité de *visiteur* de Messire Désorcy, lui est attribuée faussement ou erronément, n'était-ce pas à l'intimé, demandeur et poursuivant, à alléguer et à prouver de quels autres faits ou conditions pouvait résulter sa qualification de visiteur ?

Pour combler la lacune résultant de l'élimination inévitable de Messire Désorcy, l'intimé a aussi prétendu en Cour inférieure que, dans tous les cas, "l'approbation de *B. Lippens*, inspecteur d'école," mentionnée en la sentence, suffirait encore pour parfaire le nombre d'approbateurs exigé par l'art. 2055.

A ceci nous répondons :—1o. que la loi exige une approbation *par écrit*, et qu'il n'appert pas à la sentence que le susdit M. Lippens ait écrit ou signé sa prétendue approbation, et qu'il appert même à la requête d'appel que l'approbation *écrite* n'a été *signée* que par Messieurs Noiseux, Désorcy et Dorion.

2o. Puisque la sentence n'attribue la qualité de *visiteur* à M. Lippens qu'à sa position *d'inspecteur d'écoles*, il suffit de lui appliquer l'art. 1953, qui n'attribue cette qualité *ex officio* aux inspecteurs d'écoles que pour les *académies et*

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écoles-modèles, dans leur district d'inspection, pour faire évanouir ses prétentions, ou celles de l'intimé, au sujet de ses qualifications comme *approbateur* de l'appel.

Les appelants ont prouvé qu'il n'y a ni *académie, ni école-modèle*, dans la municipalité de Ste-Victoire ; et l'intimé n'a nullement prouvé que Ste-Victoire fût dans les limites du *district d'inspection* de M. Lippens.

II. Le texte de la loi est évidemment contre la juridiction du surintendant dans la matière. Art. 2955, R. S. P. Q.

L'espèce actuelle n'offre aucune des circonstances énumérées en l'article cité, ou aux articles auxquels il réfère.

III. Le jugement *a quo* condamne les appelants, à défaut de se conformer à ce qu'il ordonne, à payer la pénalité qu'il impose, $2,000, au requérant demandeur, l'intimé.

Rien dans la loi n'attribue cette amende au requérant en *mandamus*. L'article 1022, C. P. C., après l'énumération des cas donnant lieu à l'émanation de ce bref, ajoute: —"Toute personne intéressée peut s'adresser à la Cour " Supérieure ou à un juge en vacance, pour en obtenir " un bref enjoignant au défendeur d'accomplir le devoir " ou l'acte requis, ou de donner ses raisons à l'encontre " au jour fixé."—Ainsi, par cet article, tout ce que le requérant peut demander et obtenir par l'exercice de ce recours, c'est de faire enjoindre au défendeur d'accomplir le devoir ou l'acte requis de lui, et non une somme d'argent ou un avantage pécuniaire à son profit personnel.

Germain, Q.C., for respondent, cited a judgment rendered by the Court of Appeal at Quebec (Dorion, C. J., Tessier, Cross, Baby, Doherty, JJ.), Feb. 4, 1888, in the case of *Commissaires d'école pour la municipalité de la paroisse de St-Valier & Bouchard et al.*, which was in the following terms :—

" La Cour, etc.....

" Considérant qu'en vertu de la section 31e du chap. 15 des S. R. B. C., tel qu'amendée par la 6e section de l'acte 41 Victoria, chap. 6 de Québec, les commissaires ou syndics d'écoles sont autorisés à partager les municipalités pour lesquelles ils sont nommés en arrondissements d'école où cela n'a pas encore été fait, à changer les limites

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des arrondissements déjà existants et à en établir de nouveaux, suivant que les besoins de la population ou les circonstances locales peuvent dans leur discrétion l'exiger;

"Et considérant qu'en vertu de la 11e section de l'acte 40 Victoria, chap. 22 de Québec, les contribuables intéressés ont le droit d'appeler au surintendant d'éducation de toute décision des commissaires ou syndics d'écoles changeant les limites d'un arrondissement d'école, ou établissant un nouvel arrondissement d'école, lorsque par telle décision un ou plusieurs arrondissements d'école sont changés ou subdivisés, ou encore lorsque les commissaires d'école refusent ou négligent d'exercer ou de remplir quelques-uns des attributions ou devoirs que leur confère cette section;

"Et considérant que tous les cas dans lesquels ce droit d'appel au surintendant est accordé aux contribuables, sont des cas où les commissaires ou syndics sont par les deux sections déjà citées autorisés à prononcer "suivant les circonstances et dans leur discrétion," en sorte que ce droit d'appel est accordé non seulement lorsque les commissaires ou syndics d'écoles ont exercé leur discrétion en ordonnant que quelque chose qui est dans leurs attributions, comme de changer les limites d'un arrondissement d'école ou en subdivisant un ou plusieurs arrondissements d'école, mais encore lorsque suivant la section 11, 40 Victoria, chap. 22, ils négligent ou refusent de changer les limites d'un ou de plusieurs arrondissements scolaires ou de les subdiviser, parce qu'alors ils ont refusé d'exercer l'une des attributions ou l'un des devoirs que leur confère la loi;

"Et considérant qu'en vertu de la même section, le surintendant sur un appel d'une décision des commissaires n'est pas tenu d'ordonner simplement que les commissaires feront ce qui leur a été demandé par les contribuables intéressés ou qu'ils s'abstiendront de le faire, mais qu'il peut encore, sur tel appel, leur ordonner de faire quelque autre chose en rapport avec cette demande, ou qu'ils feront le tout ou partie de ce qui est demandé aux conditions qu'il leur imposera par sa sentence;

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"Et considérant que l'appel au surintendant du refus des appelants d'accéder à la demande des intéressés de donner au petit village de la paroisse de St-Valier, un arrondissement d'école, et la sentence du surintendant sur cet appel, étaient autorisés par la loi et n'étaient pas *ultra vires*, en sorte que les intéressés avaient le droit de demander ainsi qu'ils l'ont fait par *mandamus* l'exécution de cette sentence, et qu'il n'y a pas d'erreur dans le jugement rendu par la Cour de première instance, le 30 mars 1887;

"Cette Cour confirme le dit jugement du 30 mars 1887, et ordonne que sous deux mois après la signification de ce jugement les commissaires d'école pour la municipalité de la paroisse de St-Valier seront tenus de se conformer à la dite sentence du surintendant de l'instruction publique, en ouvrant une deuxième école dans l'arrondissement No. 2 de la dite paroisse de St-Valier à l'endroit désigné comme "Petit village," dans une maison ou partie de maison qu'ils loueront à cette fin, et condamne les dits commissaires d'écoles de la dite paroisse, appelants en cette cause, à payer aux intimés les frais encourus en cette cause, tant en Cour de première instance que sur cet appel."

May 23, 1890.]

BABY, J. (for the majority of the Court), was of opinion that the judgment appealed from should be reversed, on the ground that the formalities essential to the exercise of the appeal to the superintendent had not been observed. The appeal must be made with the approval in writing of three visitors. Now, Messire Désorcy, *curé* of the parish of St-Ours, not being a resident of the parish of Ste-Victoire, was not qualified as a visitor of the parish of Ste-Victoire, and his approval of the appeal was invalid.

CHURCH and BOSSÉ, JJ., dissented.

The judgment of the Court is in the following terms:

"La Cour, etc.....

"Considérant que l'appel référé au surintendant de l'instruction publique, dans les cas prévus par l'article 2055 des Statuts Refondus de la province de Québec (1888), ne peut avoir lieu qu'avec l'approbation, par écrit,

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de trois visiteurs autres que les commissaires ou les syndics d'écoles de la municipalité ;

"Considérant que d'après l'article 1951 des mêmes Statuts Refondus, section 2, les prêtres sont visiteurs des écoles de la municipalité où ils résident seulement ;

"Considérant qu'il est en preuve que le révérend O Désorcy, l'un des trois signataires de l'acte d'approbation écrit au bas de la requête en appel du dit intimé, au surintendant de l'instruction publique, n'a jamais résidé dans la paroisse de Ste-Victoire, et, partant, n'était pas et ne pouvait être visiteur des écoles de la municipalité de la dite paroisse, et qu'en conséquence l'approbation par lui donnée au dit appel était invalide ;

"Considérant que l'appel fait par l'intimé au surintendant de l'instruction publique de la décision rendue le 1er octobre 1888, par les appelants, n'a pas été accompagné des formalités voulues par la loi, et partant que dans le jugement dont est appel, savoir, le jugement rendu par la Cour Supérieure pour le district de Richelieu, siégeant à Sorel, le 4e jour d'avril 1889, il y a erreur ;

"Casse, annule et renverse le dit jugement, et, procédant à rendre le jugement qui aurait dû être prononcé, déboute le dit intimé de sa requête et demande en *mandamus*, avec dépens tant en Cour de première instance qu'en appel."

Judgment reversed, Church & Bossé, JJ, diss.

J. B. Brousseau for appellants.

S. A. Germain for respondent.

(J. K.)

January 9, 1891.

[IN CHAMBERS.]

Coram DORION, C. J.

EX PARTE JOSEPH F. STEPHENS, Petitioner for *Habeas Corpus.*

Habeas Corpus in civil matters—Magistrate's Court, Montreal —Illegal order of imprisonment—Art. 1052, *C.C.P.*

HELD:—1. That the Magistrate's Court for the district of Montreal, established under the authority of 32 Vict. c. 23, now Arts. 2498 *et seq.* R. S. Q., is a court of inferior jurisdiction.

2. Where an order made by an inferior court is manifestly illegal, as where the guardian of goods under seizure is condemned to be imprisoned until he gives up the goods or pays the value thereof, and the value is not mentioned in the order, the discharge of the person imprisoned under such order, will be ordered, upon a petition for a writ of *habeas corpus.*

DORION, C. J.:—

([1]) The writ upon which the defendant was arrested and is now confined in jail, is in the following words:

CANADA,
PROVINCE OF QUEBEC,
District of Montreal.

IN THE MAGISTRATE'S COURT FOR THE CITY OF MONTREAL.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith:

To the Sheriff of the district of Montreal or to any of the bailiffs of the Superior Court, acting in and for the district of Montreal, GREETING.

PETER ELIE BROWN, of Montreal, real estate agent,
Plaintiff,

vs.

Dame CATHERINE KEARNEY, of Montreal,
Defendant.

AND

JOSEPH F. STEPHENS, of Montreal aforesaid,
Mis en cause.

Whereas, by judgment rendered in our said Court, at Montreal, on the third day of December, 1890, on a rule for *contrainte par corps*, obtained by the plaintiff against the said *mis en cause*, for having, at the time of the sale of the goods and chattels of the said defendant, neglected to produce and give over to the bailiff charged with the writ of execution in this cause

[1] This opinion was dictated to a stenographer by the late Chief Justice, but was not revised by him.

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issued, to wit: Une machine à coudre Wanzer C. N. 25,423 et ses accessoires en bon ordre, seized in this cause and placed under his guardianship for the care and safe keeping of the same: the said rule was declared absolute against the said *mis en cause*, and it was in consequence ordered that he be apprehended and incarcerated in the common gaol of the district of Montreal, and therein detained until he shall have produced the said goods, chattels and effects hereinbefore enumerated, or pay over to the said plaintiff the sum of $28.95, and the sum of $3.70 amount of the costs taxed in this cause on said rule.

We therefore now command you that you take the body of said Joseph F. Stephens, the said *mis en cause*, if he may be found in your district, and him detain in the common gaol of the said district, until he shall produce the said goods, chattels and effects hereinbefore mentioned and enumerated, or pay to said plaintiff the said amount of the costs incurred upon the said rule, also the sum of one dollar for this writ, and your own fees.

And have you this writ with your doings thereon before us in our said Court at Montreal without delay.

In witness whereof we have caused the seal of our said Court to be hereunto affixed, at Montreal, this 13th day of December, 1890.

(Signed,) J. B. TRUDEL, C.M.C.

[True copy.] J. ARTHUR FRANCHÈRE,
Deputy sheriff.

I will first remark that the judgment of the 3rd of December orders that the said *mis en cause* Joseph F. Stephens be arrested and kept in jail until he produce said sewing machine or pay over the sum of $28.95 and $3.70 amount of the costs on the said rule. Then the judgment to be applied is to get the body of the said Joseph F. Stephens and detain him in the common gaol until he produce said goods or pay the said money. There is no mention there of the $28.95—the order is to detain him until he pay $3.70 costs and $1 for the writ, and other fees which are not mentioned in the judgment. Therefore the order to arrest the then *mis en cause* Stephens is different from the judgment, not in the amount of the debt and costs, but inasmuch as it stated something not mentioned in the judgment, as $1 for the writ, and your fees.

Secondly. –The judgment of the 3rd of December reads as follows:

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PROVINCE OF QUEBEC, }
District of Montreal. }

IN THE MAGISTRATE'S COURT FOR THE CITY OF MONTREAL.

The 3rd day of December, 1890.

Present:

The Honorable Mr. Justice CHAMPAGNE.

No. 2231.

PETER E. BROWN, plaintiff,

vs.

Dame CATHERINE KEARNEY, defendant,

AND

JOSEPH F. STEPHENS, of Montreal, *mis en cause.*

The Court, having heard the plaintiff on his motion of the third of December instant, for a rule against the *mis en cause* for *contrainte par corps*, on account of his default to produce, at the time and place of sale, certain effects seized in this cause and of which he had been appointed guardian, doth grant the issuing of said rule and order that the same be returnable before this Court on the 12th day of December instant, costs reserved.

[True copy.]

(Signed,) C. G. HIMSWORTH,
Dep. C. M. C.

I, the undersigned, deputy clerk of said Court, do hereby certify that the above judgment was the only judgment that was rendered by this Court in this cause, on the said 3rd day of December last past.

C. G. HIMSWORTH,
Dep. C. M. C.

Montreal, the 2nd of January, 1891.

It is a motion granted for a rule, which is the same as a rule *nisi*. The rule does not recite that he be asked what he had done with the goods, but that he be asked to produce such goods; if not, to be imprisoned. That is a rule for *contrainte par corps*. That judgment only would not be a judgment authorising to imprison.

On the 12th of December, the following judgment was rendered on that rule, confirming that of the 3rd:—

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PROVINCE OF QUEBEC, District of Montreal.

IN THE MAGISTRATE'S COURT FOR THE CITY OF MONTREAL.

No. 2231.

The 12th day of December, 1890.

Present: Mr. Justice BARRY.

PETER E. BROWN, plaintiff.

vs.

DE CATHERINE KEARNEY, defendant,

AND

JOSEPH F. STEPHENS, of Montreal, *mis en cause.*

The Court, having heard the plaintiff on the rule issued in this cause, the said *mis en cause* being called and not appearing, and inasmuch as it appears by the return of Joseph Dansereau, the bailiff charged with the writ of execution in this cause issued on the 15th day of November last, that the said *mis en cause* was duly appointed guardian of the goods and effects of defendant, to wit: une machine à coudre Wanzer No. 25423 et ses accessoires en bon ordre—seized in this cause by virtue of a writ of saisie-gagerie issued therein, which said sewing machine he has refused to hand over to said bailiff, and which had been put under his care as guardian thereof, to wit on the twenty-seventh day of November last, at the time and place fixed for such sale, doth in consequence declare said rule absolute against said *mis en cause*, and it is ordered that he be imprisoned in the common gaol of this district until he handed over to said bailiff the sewing machine aforesaid, or paid the value thereof, or the amount mentioned in said writ of execution, to wit, the sum of twenty-eight dollars and ninety-five cents, and also all costs of this rule, *distraits* to Mr. A. Leblanc, attorney for said plaintiff.

[True copy.]

(Signed,) J. N. CARDINAL,
Dep. C. M. C.

This judgment orders three things: to go to jail or deliver the machine,—if not delivered, he can pay the value thereof,—or pay the amount of the judgment and costs.

The most important part of the judgment is that "he be imprisoned in the common gaol until he produce the goods or pay the value thereof."

So he was bound to pay the value of the machine and there is no sum mentioned for that value. Is it going to be determined by the jailer, the sheriff, or the bailiff? It is not mentioned there. This judgment is illegal in some

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sense. It is on that judgment that the writ was issued. Upon the mere view of the warrant, I must say that whether it can be addressed to the sheriff or any of the bailiffs, it ought to be addressed to the sheriff,—the sheriff being the real keeper of the prison, and not the jailer.

To this writ, the following return was made:

PROVINCE OF QUEBEC,
District of Montreal.

I, Louis Payette, keeper of Her Majesty's common gaol in and for the district of Montreal, in the province of Quebec aforesaid, do hereby certify and return to Our Sovereign Lady the Queen that before the coming of the annexed writ was to me directed to wit, on the 26th day of December, 1890, the body of Joseph F. Stephens therein named, was committed into the said gaol of our said Lady the Queen under my custody by virtue of a warrant under the hand and seal of J. Arthur Franchère, deputy-sheriff, which said warrant is in the words following, to wit:

L'honorable Joseph Rosaire Thibaudeau, shérif du district de Montréal, dans la province de Québec.

Au gardien et géolier de la prison commune du dit district et à tous et chacun de mes huissiers,—Salut.

Par et en vertu d'un bref de Notre Souveraine Dame la Reine, adressé à aucun des huissiers de la Cour Supérieure pour le Bas-Canada agissant et pratiquant dans le district de Montréal, et à moi remis par Joseph Dansereau, un des dits huissiers, avec la personne de Joseph F. Stephens, arrêté par le dit huissier en vertu du bref de contrainte par corps.

Je vous commande à vous et à chacun de vous de prendre sous votre garde le dit Joseph F. Stephens, de la cité de Montréal, mis en cause, et de le détenir en sûreté dans la prison commune du district de Montréal, ou qu'il ait produit une machine à coudre Wanzer C. N. No. 25423 et ses accessoires en bon ordre pour répondre à la demande qui sera faite contre lui par Peter Elie Brown de Montreal, agent d'immeubles, demandeur, et Dame Catherine Kearney, de Montréal, défenderesse, telle que mentionnée dans la déclaration à lui être signifiée, pour la somme de $32.65 du cours actuel de cette province. Et vous me certifierez la manière dont vous aurez exécuté le présent warrant, et vous m'en ferez votre rapport incontinent, à quoi vous ne manquerez pas, à votre péril.

Donné sous mon seing et le sceau de mon office, le 26e jour de décembre, l'an de Notre Seigneur 1890, en la cité de Montréal, dans le district de Montréal.

J. ARTHUR FRANCHÈRE,
Député-shérif.

Bref daté le 13e jour de décembre 1890.

And that this is the cause and the only cause of the caption commitment and detention of the said Joseph F. Stephens in Her Majesty's gaol aforesaid, the body of which said Joseph F. Stephens I have here now as by the said writ it is commanded me. Attested at the city of Montreal, in

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the said district, in the said province of Quebec, this 5th day of January, in the fifty-fifth year of Her Majesty's reign and in the year of Our Lord 1891.

(Signed,) LOUIS PAYETTE,
Gaoler.

Voici une autre erreur. L'ordre de la Cour est adressé au shérif du district de Montréal ou à aucun des huissiers de la Cour Supérieure, etc., et le retour dit: Par et en vertu d'un bref de notre Souveraine Dame la Reine, adressé à aucun des huissiers de la Cour Supérieure, etc. Le nom du shérif n'est pas mentionné.

Il est évident par le retour que cet ordre n'est pas en conformité avec l'ordre de la Cour. Nous avons permis de l'amender, et le shérif a produit comme retour additionnel l'ordre en vertu duquel il détient le prisonnier dans la prison commune pour les causes y mentionnées.

(Retour additionnel sur le dos du warrant).

I, the undersigned, deputy-sheriff of the district of Montreal, by virtue of leave granted by the Honorable Sir A. A. Dorion, Chief Justice, this day in chambers to produce the warrant under which the within named Joseph F. Stephens was arrested and is now detained in the common jail of the district of Montreal, I now produce the within document as being the warrant upon which the said Joseph F. Stephens is detained in the said common jail, and pray that the same be considered as an additional return to the one made by Louis Payette, jailer.

Judge's chambers, Montreal, 9th January, 1891.

(Signed,) J. ARTHUR FRANCHÈRE,
Deputy-sheriff.

Deux questions maintenant se présentent:

Quelle est la Cour qui a émané cet ordre? Est-ce une Cour supérieure ou une Cour inférieure?

La Cour sur writ d'*habeas corpus* a-t-elle le droit de déclarer que la Cour inférieure n'avait pas le droit d'émaner cet ordre-là?

L'ordre est émané par la Cour de Magistrat. La Cour de Magistrat a été établie par le lieutenant-gouverneur comme lui en donne le pouvoir les articles 2498 et suivant des S. R. P. Q. Cette Cour est présidée par un magistrat ayant exercé la profession d'avocat pendant au moins cinq ans dans tous les districts excepté un, celui du Saguenay, où il n'est pas nécessaire que ça soit un avocat.

La juridiction de la Cour s'élève à $50 dans tous les districts excepté ceux du Saguenay, de Gaspé et des Iles de la Madeleine où la juridiction est de $99.

Nulle part il est dit que ce soit une Cour de record. Il est bien dit qu'elle tiendra des minutes (art. 2514), mais il n'y a pas d'articles qui déclarent que ce soit une Cour d'archives ou de record. Il est évident que le législateur ne l'a pas voulu ainsi. Il y a plus. Si l'on réfère à l'art. 2521 S. R. P. Q. il est dit que tous les articles du C. P. C. de l'art. 1184 à 1214 inclusivement s'appliquant aux Cours de commissaires s'appliqueront à quelques exceptions près aux Cours de magistrats. Il n'a jamais été reçu ici que la Cour des commissaires fut une Cour supérieure, de sorte qu'il faut décider que la Cour de magistrat est une Cour inférieure. Quand même elle serait une Cour de record, ça ne déciderait pas que c'est une Cour supérieure. C'est la juridiction qu'elle a qui fait voir si c'est une Cour de record ou non, et toute juridiction limitée paraît ne pas être une Cour supérieure.

Dans le Common Bench Reports vol. 10 p. 2, nous trouvons une cause assez récente qui nous aidera à élucider la question, celle de "José Luis Fernandès," qui étant assigné devant la Cour d'assise pour donner son témoignage sur une poursuite pour corruption électorale, refusa de répondre. La Cour ordonna qu'il fût emprisonné. Un bref d'*habeas corpus* fut demandé. L'avocat de la cause était M. Bovill, qui épuisa tous les arguments possibles pour sauver son client. A la page 9 nous trouvons une admirable définition des divisions des Cours.

(Common Bench Reports, vol. 10, New series, Scott, J. p. 8) :

In Bacon's Abridgment, Courts (D), treating of the division of Courts, and the subordination of one Court to another, it is said: "The most general division of our "courts is, into such as are of record, or not: those of "record are again divided into such as are supreme, "superior, or inferior. The supreme Court of this king-"dom is, the High Court of Parliament, consisting of the "King, Lords, and Commons who are invested with a

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"kind of omnipotency in making new laws, repealing "and reviving old ones; and it is on the right balance of "these three depends the well-being and indeed the very "being, of our constitution. Superior Courts of record "are again those that are more principal or less principal; "the more principal ones are, the Lords' House in Par- "liament, the Chancery, King's Bench, Common Pleas "and Exchequer; and, by Hale, (a) such are justices "itinerant ad communia placita and ad placita forestae. "The less principal ones are such as are held by commis- "sion of gaol delivery, Oyer and Terminer, Assize, Nisi "Prius, etc., by custom or charter, as the Courts of the "counties palatine of Lancaster, Chester, Durham, or by "virtue of Acts of Parliament and the King's Commis- "sion, as, the Courts of sewers, justices of the peace, etc." Thus the Court of Assize is placed on the same footing as the Court of Oyer and Terminer, the judge of which as being one of the less principal Courts, according to Bushell's case, Vaughan 140, has not authority to commit for contempt generally, without setting out the grounds of commitment so as to enable the Court above to judge of its propriety. Again, in Bacon, tit. Courts (D) 3, it is said: "The Courts of Westminster are the superior Courts "of the kingdom, and have a superintendency over all "other Courts by prohibition, if they exceed their juris- "diction; or writs of error and false judgment of their "proceedings; and everything is supposed to be done "within the jurisdiction of the superior Courts, unless "the contrary especially appears."

P. 36. "That principle ought to be adhered to. Unless "there is reasonable ground for thinking that the com- "mitment was void for want of setting forth in the war- "rant the facts which would show the offence and the "jurisdiction of the judge to deal with it, I am clearly of "opinion that no foundation is laid for this motion."

It was held in this case that the Court of Assize being a superior Court, the judge had jurisdiction to commit and was not bound to set out at length in his warrant

the cause of commitment, his decision not being subject to review by the Court above.

It has been held repeatedly that commissioners of bankruptcy did not constitute a superior Court.

In *Goff's* case—Maule & Selwin, p. 225, the question was again to see if it was a judgment of a superior Court or not. It was not considered a judgment of a superior Court.

Now it is said in art. 1052, C. C. P.: "The provisions "of this chapter cannot be extended to the discharge of "any person imprisoned for debt or under any action or "process in civil matters."

My view of the case is whether it presents some difficulties as regards judgments rendered by a superior Court, there can be no difficulty with a judgment of an inferior Court. All the 12th chapter must be liberally interpreted as concerning the forms of proceedings. However it applies to all cases in civil matters, and there is no means to get over it according to the terms of it.

A writ of *habeas corpus* is a writ at common law. The right of issue was never given by a statute. It was extended by statute to the king's bench. The writ would be issued at common law, if we struck out the chapter.

52 Geo. III, does not say that the *habeas corpus* was created by this statute, it existed before. It only referred to civil matters whilst that of Charles II, upon which it was based, merely referred to criminal matters.

The writ of *habeas corpus* was shown to be so beneficial for criminal matters, that it was extended to civil matters,—this is exactly our Art. 1052.

In the case of *Bessett* reported in 6 Queen's Bench, p. 481-4 (in which St. 56 Geo. III, ch. 100, is cited) it is held there that the *habeas corpus* is claimable at common law. The *habeas corpus* is a common law writ and not a statutory one.

In the *Magna Charta* it was said that nobody would be arrested but for some good cause. It was to secure the rights of individuals when wrong judgments were rendered that the *habeas corpus* was granted.

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We had lately in Quebec a curious case. *Langlois* v. *Normand*, 6 Q. L. R, p. 162. A woman was condemned to pay $50 for libel and to be imprisoned till that sum be paid. Persons can be imprisoned for damages for slander. There is an exception, a woman cannot be imprisoned. On *habeas corpus*, Mr. Justice Stuart released the woman, but did not set aside the judgment. It is for such cases that common law on *habeas corpus* was established.

The writ of *certiorari* was another remedy; it merely applies to cases from inferior Courts. It is for the purpose of seeing if a judge has exercised properly his jurisdiction. There are many judgments of inferior Courts reversed. If the form has not been followed in the proceedings and no injury done to parties, it is to be acted upon; otherwise, to be set aside. In course of time the rights were more defined—other remedies given. Cases could be appealed upon writ of error as well as on *habeas corpus*.

In cases for contempt against Parliament,—many judgments of the Federal Parliament and Legislative Assembly have been examined before Courts on *habeas corpus*. They were never put aside on questions of form.

The *Yates* case, reported in 6 Johnson's Reports, p. 335, went through all the Courts. It was on *habeas corpus*. Lord Coke said in every case upon the merits when a judgment was wrong they had a right to revise it.

There is a singular case in 33 Chs. 1. A man was arrested three times—took a writ of error against the Superior Court, went to the Court of appeal which reversed the judgment.

The statute of New York is just the same as 31 Charles II.

Let us come to our Courts.

Monk case (in 1817) 1st Stuart's Reports, p. 120, held: that a prisoner committed by the Assembly to the common gaol "during pleasure" is discharged by a prorogation. Monk was discharged by the Court of King's Bench on a writ of *habeas corpus*.

Gosset & Howard (in England), reported in 10 Queen's Bench Rep., p. 359, and p. 452.

Gladu—by the Commissioners Court of parish St. Antoine: When there is no irregularity—no *certiorari* can be obtained.

Fourkin et al., 16 L. C. J., p. 103.—Fourkin had been imprisoned under a writ of *contrainte par corps* by reason of a *folle enchère*. Mr. Justice Loranger released him. But another writ was issued on the order of the judge himself. The Court of Queen's Bench, presided by C. J. Duval, were unanimous to release Fourkin. It shows,—although you are a superior Court, we interfere and say you have no right to arrest him a second time. Held: That a discharge may be ordered upon a petition for a writ of *habeas corpus* in the case of a defendant confined in gaol under civil process.

In the case of *Duvernay & Coté* reported in 19 L. C. J., p. 248, it was held that a person who has been discharged from custody upon a writ of *habeas corpus* cannot be arrested a second time for the same cause, or where no new or other cause of arrest is disclosed.

Ex parte Dansereau, p. 210.—Held: That the Legislative Assembly of the province of Quebec has power to compel the attendance of witnesses before it, and may order a witness to be taken into custody by the sergeant at arms if he refuses to attend when summoned.

2nd. The omission to state in the Speaker's warrant of arrest the grounds and reasons therefor is not a fatal defect.

3rd. The Quebec Statute, 33 Vict., ch. 5, was not *ultra vires*.

Ex parte Lavoie, 5 L. C. R., p. 99, Judge Badgley says that the Legislature has a power necessary for its existence and has a right to arrest for contempt: that a commitment, by either House of Parliament, may be examined upon a return to a writ of *habeas corpus*: That the justices here as well as in England, possess and have exercised the power to issue writs of *habeas corpus* in matters of commitment by either House of Parliament.

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There are many other cases decided since that one, *Martin*, *Thompson*, *Pollock*. In the case of *Prince*, it was held: That a man having been discharged on *habeas corpus* could not be rearrested on the same grounds.

In re Crebassa.—Crebassa was arrested for a *rebellion en justice*, refusing to allow the bailiff to seize his goods. Mr. Justice Drummond upon a writ of *habeas corpus* declared the writ illegal and released Crebassa.

In re Cuthler.—The party was released on account of irregularity, upon a writ of *habeas corpus*.

Sunderson, 23 Canada Law Rep.

Donaghue, 9 L. C. R., p. 285. It was for libel; he pretended there was a fatal error in the warrant. Decided that a mere matter of form could not affect the judgment.

There are many authorities to show that a writ of *habeas corpus* cannot be granted to liberate a prisoner on small irregularities of form. But when it shows a want of jurisdiction, an excess of jurisdiction or when a commitment is evidently arbitrary, unjust, contrary to every principle of law, it may be appealed on *habeas corpus*.

In the present case we have a judgment of an inferior Court condemning the petitioner to go to jail until he pay the value of a certain thing. I will first say that there is no judgment on the 3rd of December. Secondly, the judgment of the 12th of December orders the party to give the machine or pay the value of it, and there is no mention of the amount of the value. Thirdly, the commitment does not speak of the order. I won't touch the commitment, I will speak only of the judgment.

The writ of execution should have been issued to pay the value of the machine. The Court did not take the trouble to give the value of it. The value is not determined. The machine may have been destroyed by *force majeure*—by fire for example, etc., and Stephens being in the impossibility of giving up the machine might have paid for it. I consider it would be a monstrous injustice then to keep him in prison until he produces the machine.

Therefore the defendant must be released.

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Ex parte Stephens.

Dorion, C. J.

I do not set aside the judgment of the Court, but I very much doubt it could be executed in the present form.

The judgment reads as follows:—

"Upon reading the return to the within writ, after hearing of H. J. Cloran, Esq. and Albert Leblanc, acting for and on behalf of the Hon. Attorney-General for the province of Quebec, and D. R. Murphy, Esq., for and on behalf of the within named Joseph F. Stephens, it is ordered that the said return be filed, and it appearing to me that the commitment is insufficient in law to warrant the detention of the said Joseph F. Stephens, it is ordered that he be and he is hereby discharged."

Petition granted.

D. R. Murphy, for petitioner.

H. J. Cloran and *A. Leblanc* for Atty.-General.

(J. K.)

March 20, 1890.

Coram DORION, C. J., CROSS, BABY, CHURCH, BOSSÉ, JJ.

OVILA ROBIN DIT LAPOINTE,

(*Plaintiff in Court below*),

APPELLANT;

AND

OLIVIER BRIÈRE,

(*Defendant in Court below*),

RESPONDENT.

Responsibility—Mare put to pasture—Fault.

HELD:—That a farmer who takes an animal to pasture on his farm, at a rate agreed upon, is only bound to exercise the care of a *bon père de famille*; and if the animal is killed or lost without any fault or negligence on his part, he is not responsible to the owner.

APPEAL from a judgment of the Court of Review, Mon-

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treal, which reversed a judgment of the Superior Court, district of Terrebonne, March 26, 1887, condemning the present respondent to pay $110 damages for the value of a mare.

The text of the first judgment is as follows :—

"La Cour, après avoir entendu les parties par leurs avocats respectifs, avoir examiné la procédure, la preuve et pièces produites, et sur le tout mûrement délibéré :

"Faisant droit à la motion du demandeur, demandant à amender sa déclaration en substituant au mot St-Benoit le mot Ste-Scholastique, accorde la dite motion sans frais, parce que le dit défendeur n'a pu être trompé sur la terre que le demandeur avait l'intention d'indiquer dans sa déclaration ;

"Et la Cour procédant à adjuger sur le mérite de cette action :

"Considérant qu'il est en preuve que vers la fin de juin, ou au commencement de juillet dernier, le demandeur, suivant convention entre lui et le défendeur, a mis en pacage sur la terre du défendeur, en la côte St-Joachim, paroisse Ste-Scholastique, une jument sous poil blond, âgée de six ans, à raison de $2 par mois ;

"Considérant qu'il est prouvé que vers le 14 juillet dernier, alors que la dite jument était ainsi en pacage sur la terre du défendeur, elle a été blessée à la patte droite de derrière entre le boulet et le jarret, blessure dont elle est morte deux ou trois jours après, malgré les soins qui lui furent donnés par le nommé James Hamilton, qui était habitué de soigner les chevaux depuis nombre d'années ;

"Considérant qu'il est en preuve que lors du dit accident, la dite jument du demandeur se trouvait dans le parc du défendeur avec d'autres chevaux de ce dernier, dont quelques-uns étaient ferrés, et qu'il résulte de la preuve que la blessure infligée à la dite jument et dont elle est morte, a pu et dû, en toute probabilité lui être infligée par un coup de pied de cheval ;

"Considérant qu'en loi, le défendeur est responsable de l'accident arrivé à la dite jument ;

"Considérant que le dit défendeur n'a fait aucune

preuve pour établir que le dit accident était dû à une force majeure ou à un cas fortuit, et qu'en l'absence de telle preuve il est responsable en loi vis-à-vis le dit demandeur, du dommage causé à la dite jument ;

"Considérant qu'il est prouvé que la dite jument valait au moins, d'après l'ensemble de la preuve à cet effet, la somme de $110 courant ;

"Condamne le dit défendeur à payer au dit demandeur la dite somme de $110 courant pour prix et valeur de la dite jument, avec intérêt du 11 septembre 1886, jour de l'assignation en cette cause, avec les dépens de la présente action, distraits, etc. Et la Cour renvoie le demandeur du surplus de sa demande, mais sans frais."

The case was taken to Review, where the judgment of the first Court was reversed, Oct. 30, 1887, by the following judgment :—

"La Cour, après avoir entendu les parties par leurs avocats, sur la demande du défendeur pour faire réviser le jugement prononcé en cette cause le 26 mars dernier (1887), par la Cour Supérieure siégeant pour le district de Terrebonne, examiné le dossier et la procédure et délibéré :

"Considérant que le demandeur poursuit le défendeur en recouvrement de la valeur d'une jument blonde qu'il avait mise en pacage sur la terre du défendeur, dans la Côte Saint-Joachim, paroisse de Sainte-Scholastique, le ou vers le 3 de juillet 1886, et qu'il allègue y avoir été frappée et blessée par d'autres chevaux, appartenant au défendeur, que ce dernier avait mis avec la dite jument ; qu'elle a été blessée le ou vers le 14, et qu'elle est morte de sa blessure le ou vers le 18 du même mois de juillet, qu'elle est morte par la faute du défendeur qui aurait mis avec la dite jument des chevaux qu'il savait être méchants et vicieux, et qui aurait négligé et retardé d'avertir le demandeur de cet accident ;

"Considérant que le défendeur a nié spécialement les allégations de la demande et dit que cet accident a dû arriver par cas fortuit ;

"Considérant qu'il est prouvé que le demandeur a vu

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lui-même le parc où il a conduit la dite jument et d'où il a retiré une jument noire lui appartenant qu'il y avait mise dans le cours du mois de juin précédent; que ce parc était celui où le défendeur faisait alors paître ses chevaux de travail ordinaire et le cheval d'un nommé Renaud; que le demandeur a été averti le soir même qu'il y a mis la dite jument, qu'il venait un peu tard, qu'il ne pourrait pas voir si elle s'accorderait avec les autres chevaux qui se trouvaient déjà dans le parc du défendeur, que la clôture du parc était en fil de fer barbelé et que la jument n'y était peut-être pas accoutumée, et qu'il a répondu: 'elle s'accoutumera;'

"Considérant que s'il est vrai de dire que la jument du demandeur ayant été sous la surveillance du défendeur, dans le parc de celui-ci, lors de l'accident, il doit au demandeur compte des circonstances dans lesquelles cet accident est arrivé, il n'est pas moins vrai de dire que la surveillance que le demandeur avait droit d'attendre ne doit pas être plus grande que celle d'un bon père de famille, de la classe et de la condition du demandeur et du défendeur qui tous deux sont cultivateurs, et proportionné au prix qui devait être payé au défendeur pour la place que sa jument occupait dans le parc avec les chevaux et autres animaux du défendeur; que ce dernier ne pouvait pas être présumé devoir tenir un gardien pour veiller à la sûreté de la jument du demandeur; qu'il ne pouvait pas s'attendre non plus que le défendeur lui ferait un enclos séparé et l'y tiendrait pour le prix si minime de $2 par mois;

"Considérant que les meilleurs pères de famille parmi nos cultivateurs de campagne ne donnent et ne peuvent donner à leurs chevaux et animaux en paturage que la surveillance compatible avec les travaux de culture qui absorbent leur temps, leurs soins et leur attention pendant la saison où la jument du demandeur était chez le défendeur;

"Considérant qu'il est prouvé que le jour de l'accident en question le défendeur, par son fils aîné, a exercé sur la dite jument et les autres chevaux une surveillance

aussi grande que celle des bons pères de famille, placés dans la condition des parties en cette cause ; qu'il a fait connaître ce qui s'est passé aussi bien qu'il était possible de le faire sous les circonstances ; que l'accident est arrivé sur la fin de l'après-midi : qu'il s'en est aperçu le soir même lors de sa troisième visite au parc, ce jour-là ; qu'il a averti le demandeur chez lui, dans la paroisse de Saint-Augustin, dès le lendemain matin ; que la condition de la jument n'a pas été empirée par le fait de ce retard ; que personne n'a eu connaissance de l'accident à l'instant même où il a eu lieu ; que si la jument a pu être frappée par les autres chevaux il est possible aussi qu'elle se soit heurtée sur quelque corps dur et se soit infligée la blessure dont elle est morte ;

" Considérant que le demandeur n'a pas prouvé comme il l'allègue que les chevaux du défendeur étaient méchants et vicieux, et que le défendeur, au contraire, a prouvé qu'ils ne l'étaient pas, et qu'ils ont toujours été tranquilles et doux pour les chevaux avec lesquels ils ont été en pacage cette année-là et l'année précédente ;

" Considérant que le demandeur n'a prouvé aucune faute d'omission ou de commission de la part du défendeur qui ait été la cause du malheur en question, et qu'il y a erreur dans le jugement rendu par la Cour Supérieure du district de Terrebonne le 26 mars dernier ;

" Casse et infirme le dit jugement, et procédant à rendre celui qui aurait dû être rendu, déboute le demandeur de son action, avec dépens en première instance et en révision, distraits à, etc."

Jan. 23, 24, 1890.]

Bastien, for the appellant :—

Dans la cause de *Roche* v. *Fraser*, 7 L. C. R. 472, il a été jugé qu'un dépositaire salarié est responsable de la faute légère, et que *l'onus probandi* retombe sur lui pour dégager sa responsabilité. Dans la cause de *Durocher* v. *Meunier*, 9 L. C. R. 8, le même principe a été affirmé. C'est d'ailleurs la doctrine enseignée par Troplong du dépôt No. 121. Massé & Verger, tome 5, page 736, Note 9. Mar-

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cadé & Pont, No. 457. Sirey & Gilbert, Cod. Civ. Ann. sous l'art. 1933, énonce que c'est au dépositaire à prouver que la perte et la détérioration ont eu lieu sans sa faute et par force majeure.

The following additional authorities were cited by the appellant :—

Sirey, Code Napoléon, art. 1382, 1383, et notes sur ces articles.

C. C. B. C. art. 1053, 1054, 1055.

Toullier, vol. 6, tit. 4. Des engagements sans convention, ch. 2, des délits et des quasi-délits, Nos. 160, 179, 6e alinéa et 182.

Troplong, vo. Louage, Nos. 904, 905, 906 et 916.

Sourdat, traité de la responsabilité, page 25, No. 1058.

Code Civil, *verbo* Dépôt, art. 1802. Jurisprudence sur cet article.

Le défendeur est un dépositaire salarié responsable de la faute légère. L'*onus probandi* retombe sur lui.

Code Civil, art. 1815. Jurisprudence sur cet article.

Un particulier recevant des chevaux dans ses étables est responsable sans preuve du contraire, tels dommages étant présumés avoir été occasionnés par sa faute.

Code Civil, art. 1629, 1675.

DeLorimier, Bibliothèque du Code Civil, vol. 13, pages 179 et 180. Commentaires sur l'art. 1629.

Bélanger v. *Quiner*, 9 R. L., p. 530.

Jugé: Que celui qui prend un cheval en pacage est responsable du dommage causé à ce cheval par un accident (jambe cassée), s'il ne prouve que l'accident a eu lieu sans sa faute. Rainville, J., C. S., Montréal

Séminaire de Québec v. *Poitras*, 1 Q. L. R., p. 185.

Desola v. *Stephens*, 7 Leg. News, 172.

Bugnet sur Pothier, *verbo*, Dépôt, vol. 5, c. 2, art. 30, p. 134.

Pothier, *verbo* Dépôt, No. 31. Duranton, p. 33, No. 39.

Massé, vol. 6, No. 308.

Pardessus, Droit Commercial, No. 625, p. 545.

Fortin, for the respondent, cited the following authorities :—

Sourdat, vol. 1er, No. 650, (édition de 1887) :

" La responsabilité est donc inséparable de l'idée d'une " faute, soit que cette faute ait pour objet direct l'accom- " plissement du dommage en lui-même comme dans les " délits et quasi-délits de commission par imprudence, " soit qu'elle ait consisté seulement à ne point le prévenir " ou l'empêcher.

" No. 653. Le débiteur est obligé de donner à l'accom- " plissement du fait qu'il est chargé d'exécuter, ou à la " garde de la chose qu'il est tenu de conserver, tous les " soins d'un bon père de famille, c'est-à-dire toute la dili- " gence qu'un homme soigneux et intelligent apporte " dans l'administration de ses affaires."

C. N. art. 1137 : " L'obligation de veiller à la conserva- " tion de la chose, soit que la convention n'ait pour objet " que l'utilité de l'une des parties, soit qu'elle ait pour " objet l'utilité commune, soumet celui qui en est chargé " à y apporter tous les soins d'un bon père de famille."

C. C. art. 1074.—" Le débiteur n'est tenu que des dom- " mages-intérêts qui ont été prévus ou qu'on a pu prévoir " au temps où l'obligation a été contractée, lorsque ce n'est " point par son dol qu'elle n'est point exécutée."

March 20, 1890.]

DORION, C. J., (for the Court) :—

We are of opinion to confirm the judgment of the Court of Review. The respondent was not bound to have a person to take care of the animal. That is not customary among farmers. There is no evidence as to how the accident occurred, but it appears to have been a *cas fortuit* for which the respondent should not be held responsible. In 1883 this Court decided a similar case, *Léonard & Levy* (Ramsay, 216). A mare intrusted to a hotel keeper disappeared. The Court held that the hotel-keeper was not responsible for a *cas fortuit*.

Judgment confirmed.

Prevost & Bastien for appellant.

Chs. L. Champagne for respondent.

(J. K.)

January 27, 1891.

Coram CROSS, BABY, BOSSÉ, DOHERTY, JJ.

CORPORATION DU COMTÉ DE VERCHÈRES,
(Defendant in Court below),
APPELLANT;

AND

CORPORATION DU VILLAGE DE VARENNES,
(Plaintiff in Court below),
RESPONDENT.

Municipal law—County council—Bridge—Procès-verbal—Arts. 535, 941, *M. C.*

HELD:—1. County bridges are under the exclusive control of the county council. The decisions of the county council are subject to appeal to the Circuit Court of the county or district, and may be quashed for illegality. This special remedy, however, does not deprive the Superior Court of the control which it has over every corporation, when such corporation exceeds or illegally uses its powers.

2. Under Art. 941, M. C., the charges imposed by a *procès-verbal* for the cost of a county bridge should be collected by the officers of the local municipality.

3. In the matter of municipal taxation the persons on whom taxes are imposed, whether as proprietors or occupants, should be clearly indicated.

4. The county council cannot charge the cost of a county bridge upon the local municipality, unless the local council has passed a by-law under Art. 535, M. C.

APPEAL from a judgment of the Court of Review, Montreal (GILL, TELLIER, TAIT, JJ.), March 31, 1890, reversing a judgment of the Superior Court. The judgment of the Court of Review is reported in M. L. R., 6 S. C. 3-10.

Nov. 18, 1890.]

Geoffrion, Q. C., for the appellant:—

L'intimé a poursuivi l'appelante pour faire annuler le procès-verbal de Joseph Geoffrion, en date du 1er décembre 1888, homologué par le conseil de comté de Verchères le 12 décembre de la même année, réglant et déterminant les travaux de reconstruction d'un pont couvrant la

rivière Notre-Dame et situé dans le village de Varennes.

En vertu de ce procès-verbal, une partie des contribuables de la paroisse de Varennes sont appelés à contribuer aux travaux du pont pour la pleine valeur de leurs propriétés, et tous les contribuables du village de Varennes sont appelés à cette contribution pour la moitié seulement de la valeur de leurs propriétés.

L'intimée se plaint de l'injustice du procès-verbal à son égard et de l'illégalité des procédés du surintendant et de l'appelante.

Par ses plaidoyers l'appelante nia toutes les allégations de la déclaration, et demanda en outre le renvoi de l'action pour deux raisons principales : la première parce que l'intimée n'avait pas attaqué le procès-verbal suivant le mode et dans les délais voulus par le Code Municipal ; et la deuxième parce qu'elle était sans intérêt pour attaquer le procès-verbal.

Le jugement de la Cour Supérieure a renvoyé l'action de la demanderesse. L'intimée porta la cause en révision, et la Cour de Révision après avoir écarté toutes les objections soulevées par l'intimée dans sa déclaration, crut devoir renverser ce jugement sur un motif qui ne ressortait pas de la contestation, et sur lequel son attention ne fut attirée que pendant le délibéré, ainsi que l'a déclaré l'honorable juge de ce tribunal qui a prononcé le jugement.

La seule raison pour laquelle la Cour de Révision a renversé le jugement de la Cour Supérieure, est parce qu'un conseil de comté n'a pas le droit d'obliger une corporation locale à contribuer aux travaux d'un pont, excepté lorsqu'il a été passé un réglement par cette corporation locale en vertu de l'article 535 du Code Municipal.

Ce motif du jugement dont nous appelons, est mal fondé en droit ; aucun article du Code Municipal ne défend à un conseil de comté de charger une corporation locale de contribuer aux travaux municipaux ; mais même en admettant le bien fondé en droit de cette prétention nous

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soumettons qu'elle ne l'est aucunement en fait, et l'erreur commise par la Cour de Révision provient de la confusion qu'elle a faite entre les mots *municipalité* et *corporation* qui ont un sens absolument différent.

Nous croyons devoir transcrire ici cette partie du procès-verbal dans laquelle la Cour de Révision a cru découvrir que les travaux du pont étaient mis à la charge de la corporation du village de Varennes : " Les frais et dé-
" penses de construction et réparations de ce pont ainsi
" que ceux occasionnés par le présent procès-verbal et les
" répartitions et frais de prélèvement, tels qu'ils pourront
" être taxés par le conseil municipal du comté de Ver-
" chères, seront supportés par les municipalités de la pa-
" roisse et du village de Varennes dans les proportions
" suivantes, et seront prélevées par le secrétaire du con-
" seil municipal du comté de Verchères, savoir :

" Dans la municipalité de la paroisse de Varennes par
" les propriétaires de terres dans la concession du bas de
" la grande côte, depuis la ligne de Verchères à venir au
" susdit pont pour leur pleine évaluation, telle que portée
" au rôle d'évaluation en force dans cette municipalité lors
" du prélèvement, comprenant :

" Le lot numéro officiel un appartenant actuellement à
" Honoré Lafleur.

" Le numéro officiel deux appartenant à Chs. Lussier.

" Le numéro officiel, etc., etc.

" Et par toute la municipalité du village de Varennes pour la moitié, seulement de son évaluation portée au rôle d'évaluation en force dans la dite municipalité lors du prélèvement.

" Je charge les propriétaires des terres susdésignées
" dans la municipalité de la paroisse de Varennes, des
" frais de construction et d'entretien de ce pont, parce
" qu'il se trouve situé sur leur chemin pour aller à l'église
" de leur paroisse et pour aller à la ville de Montréal, et
" en outre parce qu'ils sont moins chargés de travaux de
" pont et chemins publics dans leur municipalité que les
" autres propriétaires de terres de cette municipalité.

" Il est bien vrai que plusieurs propriétaires dans les

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" autres concessions dans la dite municipalité de la pa-
" roisse de Varennes, ont les mêmes besoins qu'eux de ce
" pont, mais je ne crois pas devoir les en charger parce
" qu'ils sont déjà chargés de travaux de ponts et chemins
" publics considérables.

" Et je charge la municipalité du village de Varennes
" de la moitié des frais de construction et d'entretien de
" ce pont, parce qu'il est situé sur un cours d'eau naturel
" dans ses limites et qu'il est juste que chaque munici-
" palité fasse ses travaux publics autant que possible. Je
" l'aurais chargée seule des frais de construction et d'en-
" tretien de ce pont si elle n'aidait pas à la dite munici-
" palité de la paroisse de Varennes aux travaux de cons-
" truction de son pont public qui couvre la rivière St-
" Charles sur le haut du rang de la grande côte.

" D'ailleurs ces deux municipalités ne formant qu'une
" seule paroisse leur position et les intérêts qu'elles ont
" entre elles exigent qu'elles s'entr'aident à faire et entre-
" tenir leurs ponts publics dans de justes proportions."

En lisant cet extrait du procès-verbal, l'on voit que ce n'est pas la corporation, mais bien la municipalité du village de Varennes qui est chargée de contribuer aux travaux en question, et cela, "pour la moitié de son évaluation portée au rôle d'évaluation en force dans la dite municipalité, lors du prélèvement."

Pour démontrer la différence qui existe entre les expressions municipalité et corporation, nous référons aux articles 2, 3 et 4 du Code Municipal. La corporation municipale est une personne morale représentant les habitants et les contribuables de la municipalité ; la municipalité, au contraire, n'est pas un être moral ni un corps incorporé ; c'est simplement un territoire régi par le Code Municipal.

La municipalité du village de Varennes, c'est le territoire compris dans le village de Varennes ; et lorsque le procès-verbal déclare que la municipalité du village de Varennes sera appelée à contribuer aux travaux du pont pour la moitié de son évaluation, tout ce qu'il veut dire c'est que le territoire imposable, ou en d'autres termes,

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les terrains imposables du village de Varennes, seront appelés à cette contribution; le terme municipalité, entendu dans ce sens, et c'est le seul dans lequel on peut raisonnablement l'entendre, la question en litige ne saurait présenter aucune difficulté quelconque, attendu qu'appeler les terrains imposables d'une localité à contribuer à certains travaux, c'est la même chose que si cette charge était imposée aux propriétaires eux-mêmes.

En d'autres termes il est évident que l'expression municipalité dont se sert le procès-verbal est employée dans un sens figuré pour signifier les contribuables mêmes de la municipalité.

C'est en faisant usage d'une figure de langage semblable que le code parle de propriétés imposables, lorsqu'il est bien évident que ce ne sont pas les propriétés mais bien les contribuables eux-mêmes qui sont imposés.

Pour démontrer que la signification que nous donnons au mot municipalité est bien la véritable signification, et que le sens que nous lui attribuons est bien celui que lui ont attribué le surintendant, l'appelante, ses officiers et l'intimée elle-même, nous n'avons qu'à référer la Cour aux documents suivants qui font partie du dossier, savoir : l'avis de visite des lieux par le surintendant, l'avis d'homologation du procès-verbal, la requête des contribuables du village de Varennes se plaignant de certaines dispositions les concernant contenues dans le procès-verbal, l'avis de la prise en considération du procès-verbal, l'acte de répartition et enfin la propre déclaration de l'intimée dans laquelle il est allégué ce qui suit, savoir : " et ordon-" nant de plus que la dite reconstruction soit mise à la " charge commune des propriétaires et contribuables de " la municipalité demanderesse et des intéressés résidant " dans la paroisse de Varennes." D'ailleurs, pour être logique avec elle-même, la demanderesse ne pouvait pas entendre le mot municipalité dans un autre sens, puisque dans sa déclaration elle relate certaines dispositions de l'ancien procès-verbal auxquelles elle donne sa pleine et entière approbation, et dans lesquelles il est déclaré (sic)

"que le pont sera fait et entretenu par les terres" y-mentionnées.

Ainsi donc la prétendue illégalité sur laquelle la Cour de Révision s'est basée pour renverser le jugement de la Cour Supérieure n'existe pas.

Il ne nous reste plus qu'à dire un mot de notre dernier plaidoyer.

Nous avons vu que l'intimée n'est pas chargée de contribuer aux travaux ordonnés par le procès-verbal ; s'il en est ainsi, que le procès-verbal soit illégal, irrégulier ou injuste tant que l'on voudra, l'intimée n'a aucun intérêt à l'attaquer ; or pas de grief pas d'action.

J. L. Archambault, Q.C., for the respondent :—

Première Question.

Nullité du second procès-verbal et des procédés de l'appelante et de son surintendant.

Cette proposition renferme toutes les autres.

L'intimée dans sa déclaration dit : Le pont en question est un pont de comté, régi par un procès-verbal de comté (celui de 1868) dans la construction et l'entretien duquel elle n'a rien à voir, excepté quant à la surveillance. Puis elle ajoute spécialement qu'elle "n'en a jamais ordonné "la construction et l'entretien, et qu'il n'y a aucun procès-"verbal ou autre règlement fait par elle en vertu de l'ar-"ticle 535 C. M. ou autre disposition de la loi, et que ce "n'est qu'à défaut de procès-verbal ou de règlement que "l'intimée pourrait être tenue aux travaux de construc-"tion, d'amélioration ou d'entretien du dit pont en vertu "des articles 856 et 857 du C. M., ou d'aucune autre dis-"position de la loi."

Comment se fait-il que le jugement de la Cour Supérieure ne fait aucune mention de cette partie importante de la contestation ? Est-ce une simple omission, ou est-ce que le tribunal a jugé qu'il n'y avait pas lieu de définir par une interprétation légale le sens et la portée de la question soumise à son appréciation ? Mais c'est le nœud-gordien de toute la difficulté. Quoiqu'il en soit, cette lacune a été réparée par la Cour de Révision qui a, dans

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une série de considérants clairement motivés appliqué la véritable doctrine municipale sur la matière. L'intimée soumet humblement que tout le litige entre les parties roule sur l'appréciation correcte de cette difficulté légale. Le mécanisme du droit municipal est tellement compliqué qu'il y a dans la jurisprudence de nos tribunaux peu de précédents ou de décisions applicables à l'espèce, chaque cas devant être étudié séparément suivant la nature de la cause et des faits qui s'y rapportent.

Que dit l'article 535 C. M. invoqué par l'intimée?

Le citer, c'est poser la base même de notre argument.

"Ordonner que tous les chemins ou tous les ponts mu-
"nicipaux locaux et de comté, à la charge des contribua-
"bles et situés dans les limites de la municipalité locale,
"soient faits, améliorés, et entretenus aux frais de la cor-
"poration de cette municipalité locale, au moyen de
"deniers prélevés par voie de taxation directe pour cet
"objet sur tous les biens imposables de la municipalité ;
"ou substituer la corporation aux contribuables de la
"municipalité, dans toutes les obligations qu'ont ces der-
"niers dans tous les chemins ou ponts municipaux,
"locaux et de comté, les ponts de cours d'eau et les ponts
"de chemins," etc.....

Que signifie cette disposition de la loi? Elle veut dire que tous les travaux et ouvrages dans les limites d'une municipalité sont du ressort et à la charge des contribuables de cette municipalité, et que cette dernière a, au moyen de règlements ou de procès-verbaux, l'autorité voulue pour les faire exécuter, soit en prélevant les deniers nécessaires par taxation directe, sur ses contribuables, soit en se substituant à ces derniers dans leurs obligations à cet égard. Dans un cas les travaux sont faits directement par la corporation elle-même à ses frais qui impose une taxe directe dans ce but sur tous les biens imposables au moyen d'un règlement. L'article 857, C. M., décrète la nécessité d'un tel règlement. Dans l'autre cas, la corporation peut aussi, par règlement, prendre tous ces travaux généraux à sa charge sans prélever une taxation directe sur la propriété, mais en ordonnant que le coût

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d'iceux soit payé au moyen de son revenu général, et non au moyen de la capitation spéciale indiquée en premier lieu. L'article 535 fait quelques exceptions et sauf ces exceptions, tous les travaux généralement quelconques doivent être inclus dans l'un ou l'autre règlement. Voilà un principe général dont il ne faut pas s'écarter quand il s'agit d'interpréter les attributions des conseils locaux. Mais les devoirs des conseils de comté sont aussi définis par la loi. Dans l'espèce actuelle, vu que la paroisse de Varennes où se trouve le pont en question est organisée en deux municipalités distinctes, la corporation de comté, la présente appelante, a, en 1868, cru qu'elle agissait dans les limites de sa juridiction et de ses attributions, en déclarant le pont en question comme ouvrage de comté. Après avoir "reçu les informations, fait la visite du dit pont et des lieux avoisinants afin de s'assurer de son état et quelles personnes en ont directement besoin," dit le surintendant spécial, dans son procès-verbal, l'intimée a unanimement décidé que seuls les habitants du rang de la Grande-Côte dans la municipalité de la paroisse de Varennes, et quelques propriétaires de la municipalité intimée dont les propriétés voisines du pont amènent des eaux à ce pont, devaient être chargés de cette construction ou des travaux d'entretien et de réparation. Et pourtant ce pont se trouve entièrement dans les limites du village de Varennes. Il est donc bien évident qu'on a voulu, dans le temps, respecter le principe d'égalité existant entre les deux municipalités d'après l'usage consacré dans cette paroisse de temps immémorial. Tout autre raisonnement conduirait à une proposition absurde. Jamais la corporation intimée n'a été appelée à adopter de règlement ou de procès-verbal à l'égard du dit pont en vertu de l'article 535 C. M. ou d'aucune autre disposition de la loi. Elle ne peut non plus être tenue aux travaux du dit pont en vertu de l'article 856, cité par l'appelante ; car cette dernière l'a reconnu comme pont de comté et l'a fait verbaliser comme tel, par là exemptant la municipalité intimée de cette charge et de statuer sur cet ouvrage en conformité à l'article 535 ou d'aucune autre disposition de la loi. Les contribuables

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avaient déjà beaucoup d'autres travaux considérables à supporter ; c'eût été rompre l'équilibre dans les deux municipalités que de leur confier cette nouvelle charge. Du reste, les contribuables de la municipalité de la paroisse de Varennes se sont-ils jamais plaints aux contribuables de la municipalité intimée de l'état de chose existant depuis 1868, leur ont-ils adressé quelque plainte, ou ont-ils mis la corporation intimée en demeure de changer le système qui avait toujours prévalu dans la paroisse, quant au mode des travaux publics ou à leur exécution ? Leur a-t-elle demandé d'adopter des règlements ou des procès-verbaux pour le pont en question ? Rien de tout cela n'a été fait. L'intimée, par une preuve non contredite, a établi au-delà de tout doute le fait principal allégué en sa contestation, qu'elle n'avait jamais été dans la position d'user du pouvoir à elle conféré par la loi et notamment par l'article 534 à l'égard des travaux de construction du dit pont. Le procès-verbal de 1868, œuvre du conseil de comté, l'exonérait de cette obligation, et tant que ce procès-verbal existera, elle sera dispensée d'appliquer elle-même les dispositions de cet article de la loi municipale et d'obliger ses contribuables aux travaux du pont en question suivant l'article 856 C. M. cité par l'appelante.

Telle est la proposition de droit que nous soumettons à cette honorable Cour. Elle est conforme à l'esprit de la loi municipale et à la raison. Nous en concluons donc que l'appelante n'était pas juge de statuer comme elle l'a fait sur la difficulté et qu'elle a eu tort de prendre l'initiative des procédés qui ont abouti au procès-verbal de 1888, avant que la corporation intimée eut statué elle-même sur la question des travaux du pont régi par le procès-verbal de 1868, soit *proprio motu*, soit par un arbitrage ou autre mode commun d'entente entre les deux municipalités de paroisse, destiné à changer les bases du système communal quant à la construction de leurs divers travaux publics ou généraux, ou à en montrer l'injustice.

Notre première proposition est, d'après nous, strictement correcte ; c'est-à-dire que le procès-verbal de 1888,

attaqué par la présente action, est nul d'une nullité radicale, que l'appelante en l'adoptant a commis une flagrante violation de la loi et a agi *ultra vires*.

Nous pourrions nous arrêter à cette seule proposition. Néanmoins il convient d'examiner deux autres chefs ou griefs allégués dans l'action de la demanderesse que le jugement de la Cour de Révision a signalé d'une manière générale ; d'abord l'injustice causée aux contribuables de la corporation intimée par l'adoption du procès-verbal de 1888, puis les irrégularités commises par le surintendant et l'appelante en rapport avec ce procès-verbal.

Deuxième Question.

En quoi consiste l'injustice dont se plaint l'intimée ? Elle est de deux sortes, l'une résultant du fait que les formalités essentielles et requises par la loi n'ont pas été suivies dans le procès-verbal ; l'autre de ce que le pont en question n'était pas d'utilité directe aux contribuables du village, de ce que leurs charges pour travaux publics dans la municipalité et même en dehors, et notamment le pont sur la petite rivière St-Charles étaient déjà considérables.

Sur le premier point, la prétention émise par le jugement de la Cour de première instance peut se résumer dans ces mots : le conseil de comté paraît n'avoir rien fait d'*exorbitant* de nature à justifier l'intervention des tribunaux. La Cour de Révision, adoptant un tempérament différent, déclare en toutes lettres que l'appelante a par le nouveau procès-verbal " rompu l'égalité qui doit régner " entre tous les contribuables du village de Varennes, et " que le dit procès-verbal contient des dispositions incom- " patibles avec la loi, et qu'il en résulte une injustice grave " pour les contribuables," etc.

Ce langage de la Cour de Révision est-il justifié par la preuve et est-il conforme à la loi ? Quelques explications vont le démontrer.

On a vu plus haut, pour quel motif le procès-verbal de 1868 mettait les travaux du pont à la charge des contribuables du rang de la *Grande Côte* et de quelques proprié-

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taires du village limitrophes au pont. C'était une mesure de justice adoptée au grand jour, après un examen et une visite des lieux et du cours d'eau, à la connaissance des intéressés dont les dires furent écoutés. Ces faits sont constatés au procès-verbal de 1868. En fut-il de même pour celui de 1888? Pas le moins du monde. Sans aucun prétexte apparent, l'appelante décrète un changement radical qui fait peser sur la municipalité intimée un nouveau fardeau. La requête des contribuables de la Grande Côte pour amender l'ancien procès-verbal repose apparemment sur l'article 810 (*a*) C. M. Ces amendements ne reposent sur aucunes raisons valables. Dans tous les cas, cet article exige l'examen préalable du procès-verbal après avis régulier aux intéressés. Ensuite le conseil de comté procède suivant l'article 794 C. M. A-t-on suivi la marche indiquée par le Code Municipal pour amender ce procès-verbal et opérer les changements désirés? Non, toute la procédure indique non-seulement la façon hâtive et incomplète avec laquelle le surintendant a procédé, mais aussi son ignorance de la loi et de ses devoirs. L'examen des procédés de l'appelante dont copies sont au dossier, nous l'indique. Les travaux du pont devront être faits, partie par les *contribuables du rang de la Grande Côte*, résidants de la paroisse et dont les noms sont désignés avec leurs terres dans le procès-verbal, l'autre partie par *toute la municipalité* en général, *sans spécifier la proportion* de chacun dans l'œuvre à laquelle ils devront contribuer. Que deviennent dans une pareille énumération en bloc les droits et les obligations respectives des contribuables du village de Varennes? Quelle distinction a-t-on faite entre ceux qui étaient tenus en vertu du premier procès-verbal dans le village et les nouveaux contribuables du dit village obligés dans ce second procès-verbal? Aucune. Y a-t-il parité entre eux? Leurs responsabilités sont-elles les mêmes? Combien y en avait-il parmi eux qui connaissaient l'ancien procès-verbal de 1868? La Cour de Révision avait bien raison de dire que ce procès-verbal avait *rompu l'égalité* qui doit régner entre tous les contribuables du village? On voit donc d'ici l'anomalie de ce

procès-verbal. Non-seulement le mode de procéder du surintendant et de l'appelante constitue une informalité ou un vice de forme, mais de plus une violation sérieuse de la loi et comme le dit le jugement de la Cour de Révision, "ce procès-verbal contient des dispositions incom- "patibles avec la loi, et il en résulte une injustice grave "pour les contribuables," etc. Il est donc impossible de faire exécuter ce procès-verbal dans sa forme et teneur.

L'appelante a cité en Cour inférieure l'article 16 C. M. pour tâcher d'expliquer sa fausse position. Elle a aussi prétendu que lorsque le procès-verbal et la répartition mentionnent la municipalité du village de Varennes comme étant obligée aux travaux, les expressions employées dans ces ordonnances sont inexactes et incorrectes.

Tous ces arguments spécieux ne peuvent servir à légaliser des actes parfaitement nuls, suivant nous. On abuse à notre sens de l'article 16 d'une façon étrange devant les tribunaux. On ferait bien de tenir compte aussi de l'article 15. Ces deux articles offrent une certaine latitude dans l'exercice du pouvoir discrétionnaire des tribunaux, mais dans la pratique il y aurait abus, et injustice de les appliquer à tous les cas. Dans l'espèce actuelle, nous maintenons que l'article 16 est invoqué à tort par l'appelante, car ainsi que nous le dirons plus loin, il y a d'autres formalités essentielles décrétées par la loi qui n'ont été ni observées ni suivies en rapport avec le procès-verbal de 1888, et il en est résulté une injustice criante pour les intéressés.

Les municipes du village de Varennes se plaignent qu'ils n'ont pas été consultés régulièrement sur l'opportunité des changements à faire à l'ancien procès-verbal, et en outre que le procès-verbal et tous les procédés sur icelui ont été adoptés hors leur connaissance et sans leur consentement.

Cet allégué est supporté par la preuve documentaire et testimoniale. Que dit d'abord la loi sur la manière de procéder d'une corporation dans ce cas? L'article 794 C. M. règle la matière; ou le conseil convoque les intéressés devant lui par avis public et adopte un règlement; ou il

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délègue tous ses pouvoirs à un surintendant spécial qui *visite les lieux*, fait rapport et dresse procès-verbal de ses procédés.

Dans le cas actuel, l'appelante a adopté le dernier mode de procéder.

L'appelante ou son surintendant se sont-ils conformés aux dispositions de la loi ? Pas du tout. Les plaignants sont-ils légalement tenus à de nouveaux impôts sans avoir été consultés régulièrement sur les changements apportés à l'ancien procès-verbal ? Non. On voit par le procès-verbal de 1868 que le surintendant s'était conformé à la loi, avait visité *le pont et les lieux avoisinants*, tandis que dans le procès-verbal de 1888 il n'y a aucune mention de ces faits. De plus le surintendant, entendu lui-même comme témoin, déclare qu'il n'a pas examiné et visité les lieux, bien que requis de ce faire par plusieurs intéressés. L'appelante prétend que ce n'est pas une formalité impérative dont l'inexécution entraîne la nullité de ses actes ou de ceux du surintendant. Nous contestons formellement cette prétention dans le cas actuel. Il s'agissait d'un changement radical dans le procès-verbal de 1868. Pour rejeter sur d'autres épaules les obligations de ce procès-verbal, il fallait des raisons pour justifier ce changement. La nomination d'un surintendant spécial au lieu d'une simple convocation des anciens et nouveaux intéressés devant le conseil de comté s'imposait par la loi et elle fut faite. Cet officier devenait par sa nomination le délégué direct, le factotum du conseil. Quels étaient ses devoirs ? Il devait s'enquérir si depuis le procès-verbal de 1868, le pont nécessitait une reconstruction complète ou une simple réparation ; il devait pour cela prendre connaissance du vieux procès-verbal, en donner lecture aux nouveaux intéressés qui n'étaient pas censés le connaître. Il devait surtout visiter avec eux le cours d'eau ou petite rivière en question et constater *de visu* s'il y avait quelque chose de changé ou modifié dans la situation du cours d'eau ou des terres arrosées sur son parcours depuis 1868 ; cette constatation officielle était indispensable, et on en comprend le motif. Dans un espace de temps aussi long, il

vient à se former par la crue des eaux ou par des accidents subits ou par d'autres causes des éboulis considérables qui détournent le cours naturel des eaux et les font rejeter sur d'autres terrains. Il y a des exemples fréquents de tels accidents. Comment donc prétendre que les formalités d'une visite et d'un examen attentif des lieux n'étaient pas absolument nécessaires? Nous soumettons que sans l'observation de ces formalités, dans les circonstances, le surintendant commettait non-seulement une simple irrégularité, mais manquait aux prescriptions les plus importantes de la loi ; son refus ou sa négligence d'écouter les demandes et protestations des intéressés qui ont demandé cette visite n'était nullement excusé par sa prétention qu'il était suffisamment informé ; son témoignage prouve le contraire. Donc, il a commis une illégalité dès le début, illégalité telle que toute sa procédure est entachée d'une nullité absolue et que les intéressés ont bien le droit de se plaindre qu'ils n'ont pas été ni régulièrement consultés, ni autrement entendus. Voilà donc même au simple point de vue strictement légal, une grave injustice que la Cour de Révision a condamné.

La jurisprudence a sanctionné la même doctrine dans la cause de *Dansereau et la corporation de Verchères*, 1 L. C. L. J. 92.

L'article 16 C. M., appliqué dans un sens absolu, fausse toutes les notions du droit et du bon sens. Ce serait renverser tout le mécanisme de notre organisation municipale de prétendre que ce qui doit être fait peut ne pas l'être, à la discrétion d'un conseil ou de son surintendant dans l'ignorance complète des faits. Dans l'espèce, le conseil de l'appelante pouvait-il se baser sur le rapport incomplet et imparfait de son surintendant pour juger des droits et prétentions respectifs des intéressés? Nous disons que cela était impossible. Et cependant c'est ce que le conseil de l'appelante a réellement fait en adoptant le procès-verbal de 1888. Lors de l'homologation de ce procès-verbal au conseil de comté, les intéressés ont présenté une requête se plaignant de ces faits. N'était-il pas du

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devoir de l'appelante d'examiner leurs griefs et de donner de nouvelles instructions au surintendant avant d'homologuer son rapport ? On signale l'absence de la visite des lieux, on mentionne les charges considérables qu'ils ont à supporter, et cependant l'appelante passe outre. Sur la question de fait, quelle est l'injustice ? C'est que le pont en question n'est pas pour l'utilité immédiate du village qui a déjà un pont considérable à entretenir dans la paroisse, des trottoirs dans sa municipalité dont la paroisse se sert sans payer, une pompe à incendie et d'autres charges considérables. La preuve constate ces faits. Inutile de la commenter : mais ce dernier grief n'est-il pas aussi concluant que les autres pour justifier la cassation du procès-verbal ? Nous soumettons que oui.

Troisième Question.

L'appel à la Cour de Circuit exclut-il l'action d'après le droit commun ?

Quant à la question de jurisdiction de la Cour inférieure dans l'espèce, cela ne fait aucun doute. L'intimée n'avait pas d'autres moyens de se pourvoir contre les injustices dont ses contribuables souffraient et contre l'illégalité du procès-verbal, qu'en adoptant l'appel à la Cour de Circuit ou en procédant par action directe sous le droit commun ou par bref d'injonction. L'appel à la Cour de Circuit avait été renvoyé, sur une simple informalité. Il ne restait plus qu'à adopter les autres moyens pour avoir justice. La jurisprudence de nos tribunaux a consacré ce droit.

Autorités citées sous l'article 100, C. M. (édition Mathieu), *in re Paris et Couture*, 10 Q. L. R., p. 1, et sous l'article 808, C. M., *in re O'Shaugnesssy et la corporation de Ste-Clotilde de Horton*, 11 Q. L. R., p. 152, et en particulier *in re Barbeau et la corporation du comté de Laprairie*, M. L. R., C. S. vol. 5, page 84.

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DOHERTY, J. :—

If the case had been presented here as it was presented

to the Court below, I would have had no difficulty in coming to the same conclusion as the Court below. But there was an extremely embarrassing question raised in the factum of the appellant, viz.: that the corporation is one thing and the municipality another thing. But the corporation is the living element of the municipality. They are not synonymous, but they are inseparable. The corporation is the living member that controls the dead, inert, municipality. I think the argument therefore is unsound.

The question comes up whether the municipal corporation has ever taken over the works and repairs. Until it has done so, by art. 535, M. C., the municipal corporation has no more to do with it than any other person. It appears that it has never done so; so the work is under the old *procès-verbal.*

BABY, J., concurred for the reasons set forth in the judgment as follows:—

"La Cour, etc.....

"Considérant que la demanderesse, par son action, se plaint et demande la cassation, pour défaut d'observation des formalités voulues, et pour cause d'illégalité, d'un certain procès-verbal, dressé le 8 octobre 1888, par Joseph Geoffrion en sa qualité de surintendant spécial, nommé par le conseil municipal du comté de Verchères, homologué par le même conseil le 12 décembre 1888, et dûment promulgué, pour régler et déterminer les travaux de reconstruction et d'entretien d'un pont public, sur la rivière Notre-Dame, dans le village de Varennes;

"Considérant que les travaux du dit pont étaient, par le procès-verbal antérieur homologué en 1868, et maintenu en vigueur jusqu'à son abrogation par le procès-verbal attaqué, faits et entretenus aux dépens de certains habitants, tant de la municipalité de la paroisse de Varennes que de la municipalité du village de Varennes, dans le comté de Verchères; que, lors de la mise en force du Code municipal, ce pont était, aux termes de la loi, un pont de comté, qu'il a toujours continué depuis à être connu, désigné et régi comme tel, sous l'autorité de ce même Code;

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et qu'ainsi il était et est toujours resté sous le contrôle et la direction exclusive de la corporation défenderesse ;

"Considérant que le conseil municipal du comté de Verchères avait, et a seul jurisdiction et autorité pour régler les travaux de construction, d'amélioration ou d'entretien de ce pont, sur requête de toute personne intéressée à ces travaux, et pour faire, amender ou abroger à cet égard, tout réglement ou procès-verbal s'y rapportant, mais que ces décisions étaient et sont sujettes à appel à la Cour de Circuit du comté ou du district, et à cassation pour cause d'illégalité, par la Cour de Magistrat, ou par la Cour de Circuit du comté ou du district ;

"Considérant que la jurisprudence reconnait que ces recours spéciaux n'enlèvent pas à la Cour Supérieure le contrôle qu'elle possède sur toute corporation ou corps politique, et qu'il y a encore lieu, de droit commun, de recourir à son autorité lorsqu'un conseil municipal excède ou exerce illégalement les pouvoirs qui lui sont conférés ;

"Considérant qu'aux termes de l'art. 941 du Code Municipal, les impositions créées par le dit procès-verbal, devraient être perçues par les officiers de la municipalité locale du village de Varennes, et non par ceux de la corporation du comté, tel que le décrète le dit procès-verbal, ce qui constitue une grave illégalité, et une usurpation de pouvoirs ;

"Considérant que l'imposition faite par ce procès-verbal est vague et incertaine, et, qu'en matière de taxation municipale, les personnes appelées au paiement des taxes ou impositions doivent être clairement indiquées ; et que le procès-verbal en question, de plus, n'indique en aucune façon, tel que le veut la §3 de l'art. 799 du Code Municipal, si ce sont les biens imposables des propriétaires ou des occupants qui sont tenus de contribuer à la confection des ouvrages ;

"Considérant que ce procès-verbal ne peut en loi charger les intéressés d'aucune taxe pour le dit pont, et à raison d'icelui, en la manière que le fait le surintendant ;

"Considérant que, par le procès-verbal attaqué, le conseil municipal de la défenderesse a ordonné et réglé que

les travaux du dit pont soient faits et entretenus par certains habitants de la municipalité de la paroisse de Varennes, à raison et suivant la pleine évaluation de leurs biens-fonds situés dans cette dernière municipalité, et décrits au procès-verbal, et aussi par toute la municipalité du village de Varennes, pour la moitié seulement de son évaluation portée au rôle d'évaluation en force dans la dite municipalité, lors du prélèvement ;

" Considérant que par les termes dont il s'est servi, le surintendant, dans ce procès-verbal avait évidemment en vue la corporation du village de Varennes, ainsi que l'indique clairement la répartition (pendant du dit procès-verbal) par lui faite ;

" Considérant que la demanderesse allègue dans sa déclaration, et qu'il est établi en preuve, qu'il n'a été passé aucun règlement par le conseil municipal de la demanderesse, en vertu de l'article 535 du Code Municipal, pour ordonner que tous les ponts municipaux, locaux et de comté, à la charge des contribuables et situés dans les limites de la municipalité, soient faits, améliorés et entretenus aux frais de la corporation demanderesse, au moyen de deniers prélevés par voie de taxation directe pour cet objet, sur tous les biens imposables de la municipalité, ou pour substituer la municipalité aux contribuables de telle municipalité, dans toutes les obligations qu'ont ces derniers, dans tous les ponts municipaux, locaux et de comté ; qu'en l'absence de règlement adopté à cet égard par le conseil municipal de la demanderesse, le conseil municipal de la défenderesse ne pouvait, sans violer les dispositions de la loi, mettre les travaux du dit pont, ni aucune partie d'iceux, aux frais de la corporation demanderesse ;

" Considérant que par les dispositions de la loi, tous les travaux à faire sur les ponts municipaux, soit par la loi, par les règlements ou par les procès-verbaux, sont à la charge exclusive des contribuables propriétaires ou occupants de terre ; que les pouvoirs conférés par l'article 535 du Code Municipal sont du ressort particulier des con-

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seils locaux, et que les conseils de comté n'ont pas par la loi le pouvoir de mettre ces travaux à la charge des municipalités locales, s'il n'a été passé de règlement par le conseil de ces municipalités locales, en vertu de l'article 535 C. M., au sujet de ces travaux;

"Considérant que la demanderesse pouvait, en passant un règlement à cet effet, prendre à sa charge tous les travaux de ponts; mais que le conseil de la défenderesse ne pouvait lui imposer aucunes telles charges;

"Considérant que si la demanderesse jugeait à propos d'user du pouvoir que lui confère l'article 535 C. M., il lui faudrait en user pour tous les ponts municipaux, locaux et de comté, situés dans les limites de sa municipalité, et qu'il ne lui serait pas loisible de passer de règlement, en vertu de cet article, pour un seul des dits ponts;

"Considérant que le conseil municipal de la défenderesse a assumé des attributions qu'il n'avait pas, en prétendant mettre à la charge et aux dépens de la demanderesse, par le procès-verbal attaqué, une partie des travaux du pont en question, qu'il a commis une illégalité, rompu l'égalité qui doit régner entre tous les contribuables du village de Varennes, que le dit procès-verbal contient des dispositions incompatibles avec la loi, et qu'il en résulte une injustice grave pour les contribuables de la municipalité de la demanderesse en général et en particulier, pour ceux d'entre eux qui sont chargés des travaux du pont public sur la rivière St-Charles, dans Varennes;

"Considérant qu'il n'y a pas mal jugé dans le jugement rendu par la Cour Supérieure siégeant en révision à Montréal le 31e jour de mars 1890, et dont appel, confirme le dit jugement, avec dépens contre l'appelante en faveur de la dite intimée. (*Dissentiente* l'hon. juge Bossé)."

Judgment confirmed.[1]

Geoffrion, Dorion & Allan for appellant.

Archambault, Bergeron & Mignault, for respondent.

(J. K.)

[1] An appeal taken to the Supreme Court was quashed for want of jurisdiction; 15 Leg. News, p. 5.

November 22, 1890.

Coram DORION, C.J., TESSIER, BABY, BOSSÉ, DOHERTY, JJ.

EDMUND H. WATTS,
(*Claimant in Court below*),
APPELLANT;

AND

HENRY H. WELLS,
(*Contestant in Court below*),
RESPONDENT.

Bank—Powers of—Contract of guarantee—Ultra vires.

HELD:—That a bank cannot validly enter into a contract of suretyship, guaranteeing the payment by a customer of the hire of a steamship under a charter party; and where the bank has derived no benefit from such contract, a claim made thereon against the bank in liquidation will be dismissed.[1]

APPEAL from a judgment of the Superior Court, Montreal (GILL, J.), Nov. 14, 1887, maintaining the contestation of appellant's claim upon the liquidators of the Exchange Bank of Canada.

The judgment of the Court below is as follows:—

"Considering that the claimant alleges that being the owner of a certain steamship called "Jesmond," he is entitled to be collocated *au marc la livre*, with the other creditors, on the assets of the Exchange Bank of Canada now in liquidation, upon a claim of $3,096.41, being the balance due on a certain time charter-party, whereby, in July, 1883, in the city of New York, the claimant through his agents, did lease his said steamship for two calendar months, for the price thereon stated, to S. W. Beard & Co., of Montreal, to carry coal from the port of Philadelphia, state of Pennsylvania, U. S., to the port of Montreal in Canada, and that the Exchange Bank of Canada, acting by their president and duly authorized agent Thomas

[1] See *Johansen & Chaplin*, M. L. R., 6 Q. B. 111.

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Craig, became a party to the said charter-party, and guaranteed to the claimant the payment of the hire of the said steamship, and other customary charges, by writing across the face thereof the words: 'guaranteed so far as S. W. Beard & Co. are concerned, T. Craig, Pres. Ex. Bank;'

"Considering that the said Thomas Craig was not authorised by any resolution of the directors of the said bank, to give the bank's guarantee to the said charter-party, no other director being aware of the part so taken by their president in the said document;

"Considering, that although the said bank was at the time dealing extensively with the said S. W. Beard & Co. in relation with the trade that firm was then carrying on in coal, the said guarantee so given in the name of the bank, to pay for the hire of a vessel, was not an ordinary nor legitimate and legal banking operation, such as those that were contemplated by section 40 of 34 Vict., ch. 5, now section 45 of ch. 120 of the Revised Statutes of Canada;

"Considering it has not been shown that the said bank has profited by the voyage of the said steamship, for which a balance is now claimed under the said charter-party, nor from the coal carried by her in her said voyage;

"Considering therefore, that the said guarantee, as a banking operation was illegal, and that the bank having not benefited thereby, the claimant cannot recover from the said bank;

"Doth maintain the contestation, and dismiss the said claim with costs."

Sept. 23, 1890.]

H. Abbott, Q.C., for appellant:—

As president and manager and chief executive officer of the bank, Craig had ample authority to make arrangements in connection with S. W. Beard & Co.'s account. The bank was in common parlance "carrying" S. W. Beard & Co., and of this fact the directors do not deny knowledge. Mr. Craig was apparently given unlimited authority to deal with this account as he might see fit.

It was clearly within the express powers of the bank to make advances upon bills of lading, and it is clear that they could not have obtained the bills of lading without having guaranteed the charter-party; the guaranteeing of the charter parties was merely an incident in the whole transaction, and it cannot be pretended that the whole transaction was void. If the arrangement entered into with S. W. Beard & Co. by Craig was legal and binding upon the bank, a part of it cannot be held to have been illegal and *ultra vires*.

It has been held in the Court below that the bank was not benefited by this transaction. That is true in this sense, that the bank made a heavy loss in connection with Beard's account, but it is submitted that the bank did benefit to the extent of the security which they were enabled to get and realise upon by means of these bills of lading.

It will be observed that the bills of lading imported the usual obligation upon the Exchange Bank as consignees, to pay freight for the coal as per agreement, that is, as per charter-party. The bank, by endorsing the bills of lading, and taking possession of the coal, would have become liable for the freight if any were payable thereon; but inasmuch as the vessels were chartered by S. W. Beard & Co., who were also owners of the cargo, there was no freight payable upon the coal, and the freight was represented by the charter money. Thus by means of this guarantee, the bank obtained the coal without having paid freight thereon, as they would have been obliged to do, had Beard carried the coal in any other vessels than those chartered by himself. In this way it will be seen that there was a direct benefit to the bank by obtaining coal without paying freight.

Greenshields, Q.C., for respondent, cited *Johansen & Chaplin*, M.L.R., 6 Q.B. 111.

DOHERTY, J., for the Court, held that Craig had no authority to enter into a contract of guarantee in behalf of the bank. There was no evidence to establish that the

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bank had derived benefit from the transaction. The claim was therefore properly dismissed by the Court below.

Judgment confirmed. [1]

Abbotts, Campbell & Meredith for appellant.

Greenshields & Greenshields for respondent.

(J. K.)

May 23, 1890.

Coram DORION, C.J., TESSIER, BABY, CHURCH, BOSSÉ, JJ.

COMMISSAIRES D'ÉCOLE DE LA PAROISSE DE ST-MARC,

(*Defendants in Court below*),

APPELLANTS;

AND

DAMASE LANGEVIN,

(*Petitioner in Court below*),

RESPONDENT.

Superintendent of Public Instruction—Decree on appeal from decision of school commissioners—Finality of—R. S. Q. 2055.

HELD:—On demurrer, where a petition was presented to the Superior Court for a writ of mandamus against school commissioners, to compel them to enforce a decree of the Superintendent of Education ordering them to maintain a school district and to erect thereon a school house, and the commissioners pleaded that the appeal to the Superintendent was not authorized by three duly qualified visitors as required by law, and that the commissioners had not been heard, that the pleas were not demurrable. [2]

APPEAL from an interlocutory judgment of the Superior Court, Montreal (Mathieu, J.), maintaining an answer in law to the appellants' pleas.

[1] A similar judgment was given the same day in another case between the same parties, referring to another steamship; and also in *Lindsay & Chaplin* (Dorion, C. J., Baby, Bossé, Doherty, JJ.)

[2] See *Commissaires d'École & Hus, ante*, p. 330.

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The respondent applied to the Court for a writ of *mandamus* to compel the School Commissioners to enforce a decree of the Superintendent of Education ordering them to maintain a certain school district.

The Commissioners pleaded, amongst other pleas, that the decree was rendered on an appeal not authorized, as required by law, by three duly qualified school visitors.

The respondent demurred to the plea on the ground that the decree of the Superintendent was final. The demurrer was maintained by the judgment appealed from.

Nov. 25, 26, 1889.]

Geoffrion, Q. C., and *Cornellier*, Q. C., for the appellants:—

La réponse en droit maintenue par l'honorable juge Mathieu et le dit positif de son jugement nous nie la faculté de plaider les moyens suivants, savoir:

1o. Qu'il n'y a pas chose jugée; 2o. Que nous n'avons pas été parties dans l'appel invoqué et ainsi qu'allégué dans le *mandamus*; 3o. Que nous n'avons pas eu l'occasion d'être entendus, et ne l'avons pas été; 4o. Que dans ces circonstances il n'y a pas chose jugée entre les parties, et 5o. Que cette position *ex parte* prise par l'intimé et ses compagnons, requérants devant le Surintendant de l'Instruction Publique, leur a permis de fausser les faits que nous voulons rétablir devant le tribunal.

Si l'honorable juge *à quo* s'était contenté de nous envoyer à preuve avant de faire droit, et que nous eussions pu établir le fait que l'on veut nous forcer de mettre à exécution un jugement rendu *ex parte*, il nous semble qu'il eût été plus facile pour les tribunaux de déterminer si les appelants en cette cause ont agi de bonne foi, dans la discrétion que leur reconnait la loi. Nous attirons spécialement l'attention de la Cour sur le fait que nous nions la juridiction du Surintendant, la juridiction des visiteurs, autorisant l'appel et l'appel lui-même, et que comme déduction, nous prétendons que la sentence n'est pas sur preuve par les dispositions de la loi, et ne peut pas former la base du *mandamus* que l'on demande. Si ce droit nous

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était nié il faudrait consacrer comme principe, qu'un jugement rendu par le Surintendant, inspiré par son simple caprice sans que juridiction lui soit donnée comme le veut la loi, sans enquête, serait exécutable quand même par les commissaires d'écoles, dût-il consacrer par là la création d'un arrondissement qui est impossible n'ayant pas le nombre d'enfants voulu, n'ayant pas la délimitation territoriale possible, ni l'utilité justifiable

Le pouvoir administratif du surintendant est parfaitement défini par le préambule de l'acte créant le comité de l'instruction publique par une exception créée par la loi, laquelle exception est restreinte par le statut comme toutes les lois d'exception ; il est accordé au Surintendant de l'Instruction Publique de substituer son action à l'initiative des commissaires d'écoles auxquels la loi reconnaît une discrétion absolue mais alors cette substitution à l'initiative des commissaires d'écoles doit être faite suivant les dispositions de l'article 2055 des Statuts Refondus de la province non admis. Or, nous soumettons que l'appel invoqué par le *mandamus*, la sentence qui a suivi tel appel, et la procédure qui a été suivie par l'obtention de telle sentence, tout cela ne peut être qualifié que d'un simulacre de procès, et doit être mis de côté ainsi que nous prétendons le faire déclarer par le tribunal.

La réponse en droit accepte comme vraie, l'affirmation du plaidoyer. Or, s'il est vrai que le Surintendant n'a pas été autorisé, il n'avait pas de juridiction ; s'il n'avait pas de juridiction, l'appel ne pouvait pas être reçu devant lui, il ne pouvait pas prononcer valablement sentence, et s'il n'y a pas sentence, il ne peut pas exister de droit de nous la faire mettre à exécution par voie de *mandamus*.

Bisaillon, Q. C., for respondent :—

La section 2055 des Statuts Refondus de la province de Québec se lit comme suit :

1o. " Lorsque l'emplacement d'une maison d'école est " choisi par les commissaires ou les syndics, qu'un chan- " gement est fait dans les limites d'un arrondissement " d'école, qu'un nouvel arrondissement est établi dans " une municipalité scolaire, qu'un ou plusieurs arrondis-

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" sements établis sont changés ou subdivisés, ou lorsque " les commissaires ou les syndics refusent ou négligent " d'exercer ou remplir quelqu'une des attributions ou " quelqu'un des devoirs que leur confèrent les articles 2032 " et 2049 et suivants, les contribuables intéressés peuvent " en appeler, en tout temps, au Surintendant, par requête " sommaire ; mais cet appel n'a lieu qu'avec l'approbation " par écrit de trois visiteurs autres que les commissaires " ou les syndics d'écoles de la municipalité.

" 2o. Dans sa sentence qui est finale, le Surintendant " peut ordonner que les commissaires ou les syndics fas- " sent ce qui leur a été demandé ou ce qu'il ordonne de " faire, ou s'abstiennent de le faire, ou ne le fassent qu'en " tout ou en partie et aux conditions imposées par la sen- " tence."

Comme on le voit, la sentence du Surintendant est déclarée finale par la loi.

Si la sentence du Surintendant est finale, les appelants n'ont pas le droit d'en appeler directement ni indirectement. Or, si pour répondre à leur demande qui leur est faite d'exécuter cette sentence, les appelants en demandant la cassation, en contredisent la vérité, allèguent des moyens ou des faits dans le but de faire déclarer qu'elle n'aurait pas dû être rendue telle qu'elle l'a été, ils appellent indirectement de la sentence du Surintendant.

Tremblay v. *Commissaires d'Ecole de la paroisse de St-Valentin*, 12 Can. S. C. R. 546 was cited.

DORION, C. J., remarked that in this case the Court did not decide the merits, but merely that the answer-in-law was unfounded.

The judgment of the Court reads as follows :—

"Considérant que l'appel déféré au surintendant de l'instruction publique, dans les cas prévus par l'article 2055 des Statuts Refondus de la province de Québec (1888), ne peut avoir lieu qu'avec l'approbation par écrit de trois visiteurs autres que les commissaires ou les syndics d'école de la municipalité ;

"Considérant que les appelants allèguent, par leurs plaidoyers et défenses, que l'appel de l'intimé au surin-

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tendant de l'instruction publique de la résolution adoptée par eux le 26 mars 1889, abolissant l'arrondissement No. 4 de la municipalité de la paroisse de St-Marc, n'a pas été légalement autorisé, et n'a pas reçu l'approbation de trois visiteurs compétents en loi, et n'a pas été accompagné des formalités voulues par la loi ;

" Considérant que ces irrégularités, si elles étaient prouvées, auraient l'effet d'invalider la sentence du surintendant, et que les appelants avaient droit de procéder à l'enquête pour établir le bien fondé des allégations contenues en leurs dits plaidoyers, et partant que dans le dit jugement dont est appel, savoir, le jugement interlocutoire rendu par la Cour Supérieure, à Montréal, le 21 septembre 1889, qui a maintenu les réponses en droit de l'intimé aux dits plaidoyers, il y a erreur, casse, annule et renverse le dit jugement, et procédant à juger comme la dite Cour de première instance aurait dû faire, renvoie les dites réponses en droit de l'intimé, chaque partie payant ses frais, tant en appel que sur la dite défense en droit."

Judgment reversed, Tessier & Church, JJ., diss.[1]

C. A. Cornellier, *Q.C.*, for appellants.

C. A. Geoffrion, *Q.C.*, counsel.

Lacoste, *Bisaillon*, *Brosseau & Lajoie* for respondent.

(J. K.)

[1] On appeal to the Supreme Court of Canada, the appeal was quashed on the ground that the judgment on the demurrer was interlocutory and not final.—18 Can. S. C. R. 599.

November 20, 1889.

Coram DORION, C. J., CROSS, BABY, CHURCH, BOSSÉ, JJ.

THOMAS OWENS ET AL.,
(*Plaintiffs and contestants in Court below*),
APPELLANTS;

AND

DAME KATHARINE J. BEDELL,
(*Collocated in Court below*),
RESPONDENT.

Conventional subrogation—Art. 1155, *C. C., sec.* 2—*Erroneous noting of deed by registrar.*

HELD:—1. Conventional subrogation under Art. 1155, C. C., §2, is effected without any formal or express declaration of subrogation being required, when the debtor, borrowing a sum of money, declares in his deed of loan that it is for the purpose of paying his debt, and in the acquittance it is declared that the payment has been made with the moneys furnished by the new creditor for that purpose.

2. Where subrogation is given by the terms of a deed, the erroneous noting of the deed by the registrar as a discharge, and the granting by him of erroneous certificates cannot prejudice the party subrogated. *Desrosiers* v. *Lamb*, M. L. R., 4 Q. B. 51, followed.

APPEAL from a judgment of the Superior Court, Montreal (TAIT, J.), May 18, 1888, maintaining a collocation, in the terms following:—

"Considering that the collocation of said opposant's claim before that of contestants, in the report of distribution in this cause, was and is correct and well founded: that the deed of loan by said opposant to defendant, dated 29th September, 1885, and the deed of release and discharge by Melvin Smith to defendant of same date, respectively contain the declarations required by the second part of Article 1155 of the Civil Code; that from such declarations the law presumes an intention to subrogate, and that by said deeds said opposant became and was and is subrogated in all the rights and privileges and

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mortgages of said Melvin Smith in and upon the property in question and in the proceeds thereof, and this without any express mention of subrogation in said deeds, which is not necessary;

"Considering that the intention to subrogate on the part of the debtor, being clear, and that such subrogation can by law take place without the consent of the creditors, the declaration of Melvin Smith in the latter part of the deed of release and discharge, to the effect that he released and discharged the said lot of land from the mortgage thereon created, only meant that so far as he was concerned he granted such discharge, and such declaration ought not and cannot deprive said opposant of the subrogation created in her favor by said deeds;

"Considering that the said opposant cannot be responsible for the fact that said deed of release and discharge was not registered at length, and her right to subrogation was not and is not thereby affected;

"Doth dismiss the said contestation and maintain said collocation with costs against the contestants."

Nov. 15, 1889.]

Butler, Q. C., for appellants.

Morris, Q. C., for respondent.

Nov. 20, 1889.]

The Court affirmed the judgment of the Court below, following the decision in *Desrosiers & Lamb*, M. L. R., 4 Q. B. 51.

Judgment confirmed.[1]

Butler & Lighthall for appellants.

Morris & Holt for respondent.

(J. K.)

[1] On appeal to the Supreme Court of Canada the judgment was affirmed, 19 Can. S. C. R. 137.

September 24, 1887.

Coram DORION, C.J., TESSIER, CROSS, CHURCH, JJ.

ANDREW MACFARLANE,
(*Plaintiff in Court below*),
APPELLANT;

AND

CHARLES STIMSON,
(*Defendant in Court below*),
RESPONDENT.

Tutor—Administration—Grounds for removal of—Art. 285, *C. C.*

HELD:—1. The insolvency of a tutor is not a sufficient ground for removing him from office, where he is not guilty of maladministration or unfaithfulness in the performance of his duties.

2. The fact that a tutor has left the revenues of the minor in the hands of testamentary executors who were appointed by the father of the minor, and whose capacity and solvency are not disputed, is not a ground for removing the tutor unless it appears that the interests of the minor are prejudiced thereby.

APPEAL from a judgment of the Superior Court, Montreal (TASCHEREAU, J.), September 7, 1885, dismissing an action to remove the respondent from his office of tutor to Herbert D. Smith, for the following reasons:—

"Considérant que la présente action est en destitution de tutelle, et que les allégations au soutien de la demande sont: 1o. Que le défendeur, tuteur du mineur Herbert Dudley Smith, petit-fils du demandeur, aurait mal administré les biens du dit mineur et aurait laissé l'administration à des tiers; 2o. Qu'il aurait négligé de faire procéder à l'inventaire requis; 3o. Qu'il aurait manqué de faire rendre compte aux héritiers d'un tuteur précédent; 4o. Qu'il aurait fait cession de ses biens depuis sa nomination;

"Considérant qu'il appert que les principaux revenus des dits mineurs ont été laissés entre les mains de per-

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sonnes dignes de confiance, étant les exécuteurs testamentaires nommés en vertu du testament du père du dit mineur, lesquels en font une administration sage et prudente à la satisfaction du défendeur ; qu'il n'est pas prouvé que cette administration soit au détriment des intérêts du mineur, mais qu'au contraire il est établi qu'elle est à son avantage ;

"Considérant que le reste des revenus du dit mineur parait être sagement administré par le défendeur ;

"Considérant que le défendeur a fait procéder à un inventaire des biens du dit mineur, suivant la loi, et que cet inventaire parait régulier et suffisant ;

"Considérant que le tuteur précédent du dit mineur n'a touché sur les revenus qu'une somme bien minime, et qu'eût-il laissé un reliquat de compte sa succession est insolvable, et qu'il n'eût pas été de l'intérêt du mineur d'exercer un recours contre elle ;

"Considérant que l'insolvabilité d'un tuteur survenue pendant la tutelle n'est pas par elle-même une cause de destitution si l'administration du tuteur n'accuse pas l'inconduite, l'incapacité ou l'infidélité, et que dans l'espèce aucune de ces causes ne se rencontre ;

"Maintient la défense et renvoie l'action avec dépens."

Sept. 19, 1887.]

W. H. Kerr, Q. C., for appellant :—

It is evident from the respondent's statement, that he did not consider that he had any right to enquire of the executors as to the value of the minor's property, how it was invested or the revenues which they were deriving therefrom.

In this respect the respondent is altogether in error, for while it is perfectly true that the property is invested in the hands of the trustees by the will until the minor attains the age of majority, nevertheless it was incumbent upon the respondent to ascertain what that property was and whether it was properly invested.

Moreover, as the will directs, the interest or dividends received upon the investments of the minor's property were to be paid to or for his benefit, yet not one cent of

these revenues has been so received by the respondent from the trustees except a small amount for the minor's board and education.

The respondent admits that the property of the minor exceeded in value $200,000, and that the interest upon the investments amounts to at least $12,000 per annum.

It was therefore his duty to receive such interest and dividends, and after providing for the maintenance and education of the minor, to invest the balance in proper securities.

It was also the duty of the respondent to have an inventory made of the different securities held by the trustees, and while he could not demand the transfer of the principal of these securities to him, he was nevertheless entitled to, and ought to have had an account of such investments, and to have kept books containing proper entries of these investments, so that at all times he could give communication of the same to any person legally entitled to such information, and at the same time, he should have received the surplus of the revenues from the trustees and executors, and have invested them as the law directs.

When examined as a witness, the respondent had to admit that all that he had done, so far as the trustees were concerned, was to look over their accounts—and he appears to have been satisfied with this.

When asked to enumerate the different securities held for the minor, he was unable or unwilling to give details, so that he has trusted to the honesty of the executors and trustees, and has left almost the entire management of the minor's property to these gentlemen.

No doubt the trustees are men of high standing, but the mere fact of their being so, will not satisfy the obligations and duties which the respondent undertook, and which the law obliged him to take when accepting the appointment of tutor.

W. W. Robertson, Q. C., for respondent.

Sept. 24, 1887.]

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The insolvency of the tutor is not in itself a ground for his removal, unless there be incompetency or misconduct. Here the only ground of reproach is that the tutor did not receive the revenues of the minor. It appears, however, that executors were appointed by the will of the minor's father, who were charged with the administration of the estate until the final accomplishment of the will. The revenues of the minor, over and above the cost of his maintenance and education, are allowed to accumulate with the capital. It is evident that the interests of the minor are not prejudiced, and the tutor cannot be blamed for the arrangement.

Judgment confirmed.

Kerr, Carter & Goldstein for appellant.

Robertson, Fleet & Falconer for respondent.

(J. K.)

November 26, 1884.

Coram DORION, C. J., RAMSAY, TESSIER, CROSS, BABY, JJ.

JAMES SIMPSON ET AL.,

(*Petitioners in Court below*),

APPELLANTS;

AND

CORPORATION OF THE PARISH OF STE. MALACHIE D'ORMSTOWN,

(*Respondent in Court below*),

RESPONDENT.

Municipal law—By-law—Grounds of nullity.

The corporation respondent passed a by-law on the 11th September, 1882, granting a bonus to a railway. At a meeting of council on the 16th September, 1882, a change was made in the by-law, extending the date for finishing the road from 1st Feb., 1883, to 15th July, 1883. Before the meeting of the 16th September the by-law as originally drawn was published in one issue of the *Ormstown Courier*, and after the 16th September it was published, as changed, in two issues of the *Courier*. Counting from the 16th September only 19 clear days

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Simpson & Corp. of parish of Ste-Malachie d'Ormstown.

remained before the 6th October, the first day of polling. On petition by municipal electors, 4th May, 1883, to annul the by-law on the ground (1) that the by-law voted on was not the one passed or advertised, (2) that if the by-law was considered as being of the 16th September, it could not be submitted to the electors on the 6th October:—

HELD:—1. That no substantial injustice being done, the electors having acquiesced by voting, and the by-law having been approved by the lieutenant-governor-in-council without protest, the petition should be dismissed.

2. That the change made in the by-law on the 16th September was not a *faux*.

APPEAL from a judgment of the Circuit Court, Beauharnois (BÉLANGER, J.), Dec. 4, 1883, dismissing a petition to set aside a by-law, for the following reasons:—

"Considérant que les allégués de la requête des requérants sont insuffisants et en droit et en fait pour vicier le règlement attaqué de nullité dans et par la dite requête, en l'absence de tout allégué et de toute preuve établissant qu'une injustice réelle est résulté aux requérants du dit règlement à raison des prétendues informalités invoquées dans et par la dite requête;

"Considérant que les corrections et changements prouvés avoir été faits au dit règlement le 16 septembre 1882, par et au moyen de résolution du conseil, au lieu de passer ou adopter un nouveau règlement contenant ces changements, et ce sans changer la date du dit règlement, ne constitue pas un faux dans le sens de la loi et n'a pas eu l'effet de rendre le dit règlement ni les dits changements et modifications nuls et illégaux; attendu qu'il n'apparait pas qu'il en soit résulté aucune injustice réelle aux requérants ou autres intéressés; attendu que les requérants ou autres intéressés ont voté sur le dit règlement tel qu'ainsi modifié, sans se plaindre des dits changements; et attendu encore que lorsque les dits changements ont été faits dans le dit règlement, le dit règlement n'était pas en vigueur et pouvait encore être modifié, comme il parait l'avoir été, sans pour cela être affecté de nullité ainsi que le prétendent les requérants; attendu encore que le dit règlement tel que modifié a été régu-

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lièrement affiché et publié pour l'information des requérants et autres intéressés, et que des avis suffisants et réguliers ont été donnés suivant la loi, appelant tous les électeurs, y compris les requérants, à voter l'approbation ou désapprobation du dit règlement ;

"Considérant que le fait qu'il ne s'est écoulé que dix-neuf jours entre le jour où le dit règlement a été modifié et celui fixé par l'avis pour la votation des électeurs en approbation ou désapprobation du dit règlement, n'est pas une informalité ou défaut entraînant de soi la nullité du dit règlement et son approbation par les électeurs, en l'absence d'allégués et de preuve de la part du requérant, qu'il en est résulté une injustice réelle aux dits requérants ;

"Considérant enfin que les dits requérants sont mal fondés dans les conclusions de leur dite requête ;

"Renvoie et déboute la dite requête des dits requérants avec dépens."

On the 6th and 7th days of October, 1882, voting took place in the parish of Ste. Malachie d'Ormstown upon a by-law passed by the respondent granting a bonus of $10,000 to the Montreal & Champlain Junction Railway Co., upon certain conditions mentioned therein. The result of the voting was in favor of the by-law, and it was afterwards approved by the lieutenant-governor in council and duly promulgated.

The petitioners, appellants, attacked the by-law as null and void, in consequence of the existence of certain informalities. The by-law in question was passed by the respondent on the 11th September, 1882, containing a provision, as a condition of the bonus, that the Montreal and Champlain Railway Co. should complete their railway to the village of Ormstown on or before the 1st day of February, 1883. It being doubted whether, in fact, the road could be finished so soon, another meeting of council, at which all the councillors were present, was held on the 16th September, and the date for finishing the road was changed from the 1st February, 1883, to the 15th July, 1883. In the meantime, before the

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meeting of the 16th September, the by-law, as originally drawn, was published in one issue of *The Ormstown Courier*, of date 14th September, 1883. After the change made on the 16th September the by-law, as changed, was published in the two subsequent issues of the *Courier*. The by-law was published and posted as a by-law made on the 11th September; counting from the 16th September only 19 clear days remained before the 6th October, the first day of polling.

In the Court below, appellant presented a petition for leave to inscribe *en faux* against the original by-law and the copy produced, on account of its having been changed as above stated. Respondent filed an admission of the foregoing facts, and the Judge refused the petition on the ground that it was not a *faux*.

Sept. 20, 1884.]

J J. Maclaren, for the appellants, contended on the foregoing facts that the by-law was illegal:

1o. Because the by-law published and submitted to the municipal electors, and approved by the lieutenant-governor in council, was not the by-law passed and adopted by the municipal council on the 11th September, 1882, as falsely stated in the certificate of the secretary-treasurer at the foot thereof.

2o. Because said by-law passed and adopted on the 11th September, 1882, could not be amended by a resolution, as was attempted to be done, but could only be amended by another by-law.

3o. Because the said by-law was changed and altered in a material and essential point after the day it purports to have been passed by said municipal council.

4o. Because the words actually struck out of said by-law of the 11th September are not the words ordered to be struck out by the resolution of the 16th September.

5o. Because the 6th October, 1882, the day for which the said meeting of municipal electors was convened, was less than 20 days, to wit only 19 days after the day on which the by-law was actually passed by said municipal council, as aforesaid.

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6o. Because said by-law and certificate are irregular, null and void, and are moreover false, as hereinabove set forth.

J. S. Archibald for respondent.

Nov. 26, 1884.]

RAMSAY, J.:—

I concur in the general principles on which appellants rely, but I do not think they apply in the present case. If the change complained of had made a new by-law I fancy there can be no doubt that voting on the 19th day, instead of on the 20th day, would have been fatal to the proceedings. There would have been no valid ratification. But enlarging the delay for completing the work was not a substantial change of the by-law, and no one was or could be injured by it: Art. 16, M. C. should be applicable in a case of that sort. This case has no resemblance to *Cooey & Brome*. In that case the poll was not held regularly in one township, in fact it can hardly have been said to have been held at all, and the majority of the Court did not think it was sufficiently proved that the vote was exhausted. (1 Leg. News, 519.) I am to confirm.

DORION, C. J.:—

We find here nothing to indicate that the slightest injustice has been done. The appellants ought to show some injustice or strong probability of injustice. In the *Cooey* case I differed on the ground that I could not find that any injustice had been done.

Judgment confirmed.

Maclaren, Leet, Smith & Rogers for appellants.

Archibald & McCormick for respondent.

(J. K.)

June 22, 1877.

Coram DORION, C.J., MONK, RAMSAY, SANBORN, TESSIER, JJ.

REGINA v. ARTHUR B. GLASS.

Criminal law—Larceny—General deficiency.

HELD:—That evidence of a general deficiency in the books of a clerk in a bank will not alone support an indictment for larceny. There must be some proof of a taking, that is, that certain money went into the hands of, and was taken by the prisoner.

CASE RESERVED by the Court of Queen's Bench, Crown side (RAMSAY, J.), March, 1877:—

"The prisoner was indicted for larceny. The evidence established that he was first receiving teller in Molsons Bank in Montreal, that as such receiving teller it was part of his duty to receive from the assistant accountant drafts on other banks coming from the branches of the Molsons Bank, to acknowledge the receipt of such drafts in a book kept by the assistant accountant, called the Cash Items book, to enter them in the books kept by him, and to send them in for collection. It was further proved that on the 29th of November last there was a general deficiency in prisoner's account to a large amount, that on the 25th November he had received two drafts sent with letter of advice by the London (Ont.) branch, one being for $21.12, and the other for $1,425.60. The smaller of these drafts was entered in the Cash Items book and initialed for by the prisoner, but the larger was neither entered in said book nor initialed for. Both of these drafts were entered in a book kept by prisoner, called "the receiving teller's balance book," and both drafts were sent in next day for collection, that for $1,425.60 to the Merchants Bank where it was payable, and credited to the Molsons Bank. But the draft for $1,425.60 was not entered in prisoner's cash book. He charged himself only with $3,488.96 on that day, which did not include the draft of $1,425.60, and it appears that if he

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had charged himself with that amount, the sum of $3,488.96 would have been greater by the amount of $1,425.60. It was further proved that the balance in the receiving teller's balance book on the 25th of November, which was in prisoner's handwriting, was $62,945.67, and that it should have been $52,418.67.

"The Crown contended that this constituted the crime of larceny of $1,425.60.

"The prisoner was convicted, and I reserved the following questions for the opinion of the Court:

1st. Whether prisoner could legally be convicted of larceny of $1,425.60 on proof of a general deficiency to a much larger amount, and without any evidence of the taking of a specific sum.

2nd. Whether the prisoner's offence, if not larceny, was embezzlement.

3rd. Whether, if embezzlement, a verdict of larceny would be good."

June 18, 1877.]

T. W. Ritchie, Q. C., for the Crown.

Terrill for the prisoner.

June 22, 1877.]

RAMSAY, J.:—

In some cases it appears to be very extraordinary that proof of a general deficiency should not support an indictment for larceny. The bad faith of the accused, his evident criminality, seem to be covered over by an unmeaning technicality. On reflection, however, it will be seen that any other rule would lead to very great inconvenience. There would be the danger of confounding innocence with crime, for it is almost impossible to establish any rule that would not include an undiscovered error of book-keeping, or an accidental over-payment. There would be this other difficulty, that there would be no limit to the number of indictments that might be laid on one and the same offence. Whether these difficulties may be overcome by legislation it is not for us particularly to inquire. It is the unquestionable law of England

that neither larceny nor embezzlement can be sustained on proof alone of a general deficiency, and therefore I think the verdict in this case should be set aside. I say proof alone of a general deficiency, for if there be evidence of a particular sum going into the possession of the complainant and being taken, it will suffice, although there be no precise evidence of the time it was taken or the amount taken. *R.* v. *Wright*, 7 Cox, 413. The distinction between that case and this is very marked. There is only proof of a general deficiency, and the supplementary evidence relied on, that is, the transaction as to the London draft for $1,425.60, established that the proceeds of that draft never were in the hands of the prisoner at all, but were credited to and accounted for to the bank by the payee. The draft was probably used to cover a crime, but the prisoner most certainly never stole it or its proceeds.

Judgment:

"It is considered and adjudged..... that the said Arthur B. Glass ought not to have been convicted of the felony in the case reserved for the consideration of this Court."

Conviction quashed.[1]

T. W. Ritchie, Q. C., for the Crown.

Terrill for the prisoner.

(J. K.)

[1] The prisoner was subsequently convicted on an indictment for embezzlement, Dorion, C. J., and Cross, J., presiding. This conviction was affirmed. See report, 1 Leg. News, 41.

March 26, 1890.

Coram DORION, C.J., TESSIER, CROSS, BOSSÉ, DOHERTY, JJ.

REGINA v. EDWARD SLACK.

Criminal law—Embezzlement—Evidence.

HELD:—On the trial of a secretary-treasurer of a municipal corporation for embezzlement, evidence of a general deficiency having been given, accompanied by evidence of unlawful appropriation by the prisoner of moneys received by him by virtue of his employment, that the conviction was right, though it was not proved that a particular sum coming from a particular person on a particular occasion, was embezzled by the prisoner.—R. v. *Glass*, 1 Leg. News, 41, followed.

CASE RESERVED by the Court of Queen's Bench, district of Bedford (Crown side), LYNCH, J., March 10, 1890, as follows :—

The prisoner was arraigned, tried, and found guilty on the 5th March, 1890, on the following indictment:

'Edward Slack, of the village of Waterloo in said district of Bedford, on the 24th day of the month of January, 1889, at the village of Waterloo aforesaid, being employed in the public service, to wit, as secretary-treasurer of the corporation of the township of Shefford, a municipal corporation, and a body politic and corporate, and having its office and place of business in the village of Waterloo aforesaid, and being intrusted, by virtue of such employment, with the receipt, custody, management and control of certain money to the amount of $5,207.98, the property of the corporation of the township of Shefford aforesaid, did then and at different times whilst he was so employed, and by virtue of such employment, receive and take into his possession certain sums of money to a large amount, to wit, to the amount of said sum of $5,207.98, the property of said corporation of the township of Shefford, and the said money amounting to said sum of $5,207.98, then fraudulently and feloniously did embezzle; and so the jurors aforesaid, upon their oath aforesaid, do say that the said Edward Slack, in manner and form aforesaid, the said money amounting to said sum of $5,207.98, the pro-

perty of the said corporation of the township of Shefford, feloniously did steal, take and carry away, against the form of the statute in such case made and provided, etc.

'And the jurors aforesaid, upon their oath aforesaid, further present that the said Edward Slack, on the 24th January, 1889, aforesaid, at the village of Waterloo aforesaid, being employed in the public service, etc. (*recital as above*), and being intrusted, by virtue of said employment, with the receipt, custody, management and control of certain money to the amount of $11,230.60, the property of the said corporation of the township of Shefford, did then and there and at different times, on and between the 5th May, 1885, and 10th January, 1889, and while he was so employed, and in virtue of such employment, receive and take into his possession certain sums of money amounting to and forming said sum of $11,230.60, the property of said corporation of the township of Shefford, and a part thereof, to wit, the sum of $5,207.98, the money and property of said corporation of the township of Shefford, then fraudulently and feloniously did embezzle, and so the jurors aforesaid, upon their oath aforesaid, do say that the said Edward Slack, in manner and form aforesaid, the said money amounting to said sum of $5,207.98, the property of the said corporation of the township of Shefford, feloniously did steal and carry away, against the form of the statute, etc.'

At the trial it was proved, and I so charged the jury, that prisoner was appointed secretary-treasurer of the corporation of the township of Shefford, on the 4th May, 1885, and that he continued to act as such until the 24th January, 1889, when he was dismissed; that on the said 4th May, 1885, he received from his predecessor in office the sum of $1,191.87; that on the 31st December, 1885, he had on hand, or should have had according to his books, after deducting payments from receipts, a balance of $1,128.74; that on the 31st Dec., 1886, he had on hand, or should have had according to his books, after deducting payments from receipts, a balance of $2,530.99; that on the 10th January, 1889, he had on hand, or should have

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had according to his books, a balance, after deducting payments from receipts, of $5,207.98, which he could not and did not account for; that from the 1st January, 1887, inclusive, he had received as such secretary-treasurer up to said 10th January, 1889, the sum of $11,230.60, and during the same period had paid out the sum of $6,022.62, leaving the said balance of $5,207.98, which he should have had on hand on the said 10th January, 1889, according to his books, and which he could not and did not account for; that said sum of $11,230.60 received by prisoner during said period, was composed of the balance of the year 1886 and of many smaller amounts received at various and different dates, and that said sum of $6,022.62 disbursed by him, was similarly composed; that prisoner did not during the year 1888, submit any statement of his accounts for the year 1887, although frequently asked to do so in an informal manner by the mayor and councillors of the township of Shefford; that no auditors were named for 1888, and no audit of prisoner's accounts for 1887 was made; that prisoner had made no entries of receipts in his cash book after the 4th June, 1888, but a memo. of receipts given by him after that date was found on the stubs of his blank receipt book; that on the said 24th January, 1889, prisoner admitted the correctness of the said balance of $5,207.88, as shown by the audit of his accounts, remarking at the same time that it was not so much as they first said it was, that it might have been worse, that he had no money; that he had a large family, and that the money was gone; that on said 24th January, 1889, prisoner said he would give security for said balance, and both he and his wife made certain propositions in that direction to the mayor and councillors, which could not be accepted; that a civil action is now pending in the Superior Court for said district, against the prisoner for the recovery of the sum of $5,729.65, which includes said sum of $5,207.98, and which among other things asks that prisoner be condemned to render a true and correct account, and to which action prisoner has not pleaded, and has been foreclosed from pleading; that on

the 27th February, 1890, prisoner made to the mayor and councillors, at an informal meeting which he himself convened, a proposition for the settlement of said civil suit, offering certain securities to the value of $2,000, and a confession of judgment for $1,000, which he thought he might be able sometime to pay, saying that he had no money, and that if it was thought better he would confess judgment for the whole balance after deducting the $2,000, although it was very doubtful if he could ever pay it, which proposition has not been accepted.

After the conclusion of the case for the Crown the prisoner called no witness for his defence.

From all the foregoing facts, established by a number of witnesses, by the books of the corporation kept by the prisoner himself, and by the admissions made by the prisoner, I felt it to be my duty to distinctly charge the jury that the crime as laid in the indictment had been unequivocally brought home to the prisoner, and that its essential ingredient, the fraudulent conversion, had been abundantly proved.

During the trial prisoner's counsel objected to the introduction of evidence of a general deficiency of monies that ought to be forthcoming, as sufficient to sustain the indictment, and contended that there must be proof of the embezzlement of some particular or specific sum.

I have deemed it my duty, in the exercise of the discretion conferred upon me by statute, to reserve the above question of law for the consideration of the justices of the Court for Crown cases reserved, to wit, the Court of Queen's Bench on the appeal side thereof.

March 21, 1890.]

G. B. Baker, Q.C., for the prisoner.

T. H. Duffy for the Crown.

DORION, C. J., said that there was no question on which there had been greater difference of opinion among English writers and judges. Formerly it was necessary, on an indictment for embezzlement, to prove the particular kind of money embezzled. It was obviously a matter of extreme difficulty to prove the embezzlement of particu-

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lar money by a servant, which had never been in the possession of the master, and the law had been changed. But a difficulty still remained, whether it was necessary in a case of embezzlement to prove that a specific sum had been embezzled, or whether proof of a general deficiency would support the charge. On this question there had been considerable difference of opinion. After referring to several of the English cases, the Chief Justice cited the *Glass* case which occurred in Montreal in 1877 (1 Leg. News. 41), in which it was held that a bank clerk may be convicted of embezzlement on proof of a general deficiency with evidence of unlawful appropriation, though no precise sum paid by any particular person on a particular occasion, was proved to have been taken. He could see no difference between the case of Glass and the present one, and the conviction must therefore be maintained.

Judgment:

"It is considered and adjudged and finally determined ..... that in the opinion of this Court the proceedings had or taken in the said Court at Sweetsburg are regular, that the ruling of the judge presiding the said Court of Queen's Bench is correct, and that no reason hath been assigned by and on behalf of the said Edward Slack sufficient to set aside the conviction on the indictment in this cause."

Conviction maintained.

G. B. Baker, *Q. C.*, for the prisoner.

T. H. Duffy for the Crown.

(J. K.)

January 26, 1891.

Coram DORION, C.J., CROSS, BABY, BOSSÉ, DOHERTY, JJ.

REGINA v. FORD AND GRAHAM.

Obtaining a valuable security by false pretences—Concealment —Amendment of indictment.

The prisoners obtained a subscription for a firemen's fund, concealing the fact that one-third only of the amount was to go to the fund. The subscriber deposed that he would not have subscribed if this fact had been disclosed to him.

HELD:—1. That the concealment as to the application of the amount constituted a false pretence.

2. The amendment of the indictment, by substituting the name of a different person for the person named in the indictment to whom the false representations were made, is justifiable.

3. The cheque of a firm, before it is endorsed by the payee, and while still in the hands of one of the members of the firm, is not a valuable security within the terms of the Larceny Act, R.S.C., ch. 164.

CASE RESERVED by the Court of Queen's Bench, Crown side, Montreal (DORION, C.J., presiding), at the trial of Ford and Graham, on a charge of having, on the 29th of May, 1890, obtained by false pretences from John S. Allan a valuable security, to wit, a cheque for $100 the property of Andrew Allan and others, the said false pretences not described.

The questions submitted for the adjudication of the Court are the following: 1o. Did the representations made by the prisoners to Andrew Allan, that they were making a collection for the firemen's fund, without declaring that two-thirds of the money collected would be returned to them for their services, constitute a false pretence which, under the circumstances proved, could justify a verdict of guilty for obtaining a valuable security by false pretences?

2o. Was the cheque of H. & A. Allan before it was endorsed by the payee, and while still in the hands of Andrew Allan, a member of the firm of H. & A. Allan, a valuable security within the terms of the Larceny Act, ch. 164 of the Revised Statutes of Canada?

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30. Was the Court justified by law in allowing the amendment proposed, to substitute the name of Andrew Allan for that of John S. Allan in the indictment?

If all three questions are decided in the affirmative the verdict and conviction of the prisoners should be maintained, but if any one of them is answered in the negative, then the verdict and conviction ought to be quashed and annulled.

I pronounced no sentence, and the prisoners are now detained in the common gaol of this district pending the decision of the Court on the questions hereby reserved.

January 15, 1891.]

R. C. Smith for the prisoner.

St-Jean for the Crown.

DORION, C.J.:—

Questions of considerable difficulty and importance are presented by this case. Ford and Graham were tried on a charge of having, on the 29th May last, obtained by false pretences from John S. Allan a valuable security, viz., a cheque for $100, the property of Andrew Allan and others. John S. Allan was the second witness, and when asked to whom he gave the cheque, he replied that he gave it to his father, Andrew Allan, and that he had no communication with the prisoners. So it was evident that the case must fail as presented in the indictment. The Crown prosecutor then moved to substitute the name of Andrew Allan for John S. Allan. This was granted and the case proceeded. The Court, at the conclusion of the case for the Crown, ruled that there was sufficient evidence for the case to go to the jury, and the prisoners were convicted. The Court, however, had considerable doubt on some points, and reserved three questions for the consideration of the full bench.

The facts of the case as disclosed by the evidence are that Ford and Graham went to Benoit, Chief of the Fire department, and proposed to him to establish a benevolent fund for disabled firemen. Mr. Benoit replied that he would be glad to see it carried out. The prisoners said they proposed to publish a souvenir work, containing

sketches, etc., and advertisements, and that one-third of the subscriptions would go to that, one-third to themselves for their trouble, one-third to the fund. The prisoners subsequently called upon several parties and obtained subscriptions to the amount of about $1,400, including a cheque for $100 from Mr. Andrew Allan, which they obtained by representing that they were collecting for a firemen's fund. The cheques were made payable to the order of Mr. Benoit, Chief of the Fire Department. They did not disclose to Mr. Allan that they were to have two-thirds of the amount for the purposes above mentioned, and Mr. Allan's testimony was positive that if he had known this fact he would not have subscribed.

The first question reserved is whether the concealment of the fact that the whole was not to go to the firemen's fund was sufficient to justify a verdict of obtaining a valuable security by false representations. On this point the Court has come to the conclusion that there was a false representation. The concealment of the fact that part of the amount was to be devoted to other purposes was equivalent to a false representation.

Another question reserved was whether the Court was justified in allowing the amendment proposed, to substitute the name of Andrew Allan for that of John S. Allan in the indictment. It was not a case of a clerical error being committed in a name, there being two persons in the office bearing these names respectively. It changed the person to whom the false representations were made, and the person who gave the cheque to the prisoners. After reviewing the decisions and authorities on this question, the Court has come to the conclusion that the amendment was one which might properly be allowed.

The last question reserved was whether the cheque of H. & A. Allan, before it was endorsed by the payee, and while still in the hands of Andrew Allan, a member of the firm of H. & A. Allan, was a valuable security within the terms of the Larceny Act. On this question there are few precedents, and these date back a good many years. In one — the oldest of three decisions — the Court held

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that a note payable to order was not a valuable security in the hands of the maker. In the other two cases, the instrument was payable to bearer, and it was held a valuable security. I have felt considerable doubt on this point, and in this Court I find that two of my colleagues entertain one opinion, and the other two hold a contrary opinion, so that I am under the necessity of determining what the judgment of the Court should be. My doubts are not removed by the examination I have made of the law, but upon the whole, I am disposed to hold that the cheque in the hands of Andrew Allan was not a valuable security within the meaning of the law. If there had been another count in the indictment, that the prisoners had obtained the piece of paper on which the cheque was written, or if the indictment had alleged that they obtained the cheque of H. & A. Allan with a view to making it a valuable security, the conviction might have been sustained.

Judgment:

"It is considered and adjudged and finally determined by the Court now here, pursuant to the statute in that behalf, that the evidence adduced did not justify a verdict of obtaining a valuable security by false pretences, and that the said prisoners ought not to have been convicted, and their conviction is therefore quashed and set aside."

Conviction quashed, (1) Baby and Bossé, JJ., diss.

Maclaren, Leet, Smith & Smith for the prisoner.

St-Jean for the Crown.

(J. K.)

(1) The Chief Justice suggested that the case should be taken to the Supreme Court of Canada, in order that the opinion of that court might be obtained on the point. No appeal, however, was prosecuted.

January 26, 1891.

Coram CROSS, BABY, BOSSÉ, DOHERTY, JJ.

GEORGE DAVELUY *et al. es-qual.*,
(*Plaintiffs in Court below,*)
APPELLANTS;

AND

LA SOCIÉTÉ CANADIENNE FRANÇAISE DE CONSTRUCTION DE MONTRÉAL,
(*Defendant in Court below,*)
RESPONDENT.

Building Society—Pledge—Irregular transfer of shares—Insolvency—Rights of creditors.

A by-law of a building society required that a shareholder should have satisfied all his obligations to the society before he should be at liberty to transfer his shares. P., a director, in contravention of the by-law, induced the secretary of the society to countersign a transfer of his shares to the Banque Ville Marie as collateral security for an amount he borrowed from the bank, and it was not until P.'s assignment in insolvency that the other directors of the society knew of the transfer to the bank. At the time of his assignment P. was indebted to the society in a sum of $3,744, for which amount, under the by-law, his shares were charged as between P. and the society. The society immediately paid the bank the amount due by P. and took an assignment of the shares. The shares being worth more than the amount due to the bank, the curator to the insolvent estate of P. brought suit claiming the shares as forming part of the insolvent's estate, and with the action tendered the amount due by P. to the bank. The society claimed that under the by-laws the shares were pledged to them for the whole amount of P.'s indebtedness to them. The Superior Court held that the payment by the society of the bank's claim annulled the transfer made by P. in fraud of the society's rights, and that the shares in question must be held as having always been charged under the by-law with the amount of P.'s indebtedness to the society, and that his creditors had only the same rights in respect of these shares as P. himself had when he made the abandonment of his property, viz., to get the shares upon payment of P.'s indebtedness to the society. On appeal to the Queen's Bench:

HELD:—That the possession of the shares had passed from P. to the bank; that the right to recover the shares from the bank, on pay-

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ment of its advances thereon, was vested in P., and passed to his creditors upon his insolvency; and that after P.'s insolvency it was not competent for the society to acquire any privilege or pledge over the shares to the prejudice of P.'s creditors by paying the claim of the bank.[1]

APPEAL from a judgment of the Superior Court, Montreal (DAVIDSON, J.), May 9, 1889, dismissing an action brought by curators The learned judge, in delivering the judgment appealed from, made the following observations:

Plaintiffs, taking this action in their quality of curator to the insolvent estate of C. F. Picard, deposit $1,664.43, and pray that twenty certain shares of the society's stock be declared their property, and the defendant ordered to so enter the shares upon its books, or in default of so doing be condemned to pay $4,000. On the other hand the defendant, by reason of the facts set forth in its plea, and which I shall presently relate, declares its readiness to so register the stock, but only on payment of the said deposit and of $3,744, with interest from the 25th of February, 1885.

As collateral security for loans aggregating $1,550, Picard on the 17th March, 1882, transferred ten shares known as *livret* 274, and on the 22nd December following ten other shares known as *livret* 22 to the Banque Ville Marie. These transfers are, as required by by-law 11, entered in the transfer book, signed by the transferor and transferee, and countersigned by the secretary-treasurer. Nevertheless, says the society, they were severally null and void, because by that same by-law no transfer could be made until all obligations toward the society had been met, and Picard being at that time largely indebted to us, only got these entries to be made through dishonest collusion with the secretary. Of the fact that these transfers existed the society only became aware in February, 1886, and being certainly good as regarded the Banque Ville

[1] But on appeal to the Supreme Court of Canada, the judgment of the Queen's Bench was reversed, and the original judgment restored.—15 Leg. News, p. 166.

Marie, its claim was paid off, and a subrogation taken (dated 11th March, 1887) of all its rights. It is this sum of money which the plaintiffs tender with their demand for the delivery of the shares, while the plea asserts that these same shares were taken from it by fraud, and must be held to protect the loans made to Picard by the society on their assumed possession and security. When Picard made his transfers to the bank he owed the society in the neighborhood of $1,000, and by the 25th February, 1885, renewals and new loans had brought the amount up to $3,744. This was and still is represented by a demand note, which, as on the occasion of each preceding settlement, specially covenanted that his stock was transferred to and held by the society as collateral security, to be by it, in case of his default, taken in payment and sold without any *mise en demeure* being necessary. At the date of this last renewal, and, indeed, up to February, 1886, the directors' board of the society, as already stated, remained in ignorance of the fact that its security had passed into the hands of the Banque Ville Marie so far back as 1882. Of these directors Picard was one, and he also kept the books. By imposing the influence of his position upon the secretary-treasurer, and by solemnly promising to pay the bank almost instantly, he induced the latter to betray his trust by entering and countersigning the transfers. It is of transfers so secured that the plaintiffs now seek to take advantage, and to deprive the defendant of its security by claiming, 1. That the transfers to the bank divested the society of whatever rights it had; 2. That the society made claims upon Picard's estate, in which they are recognized; 3. That the society tendered the amount of the loans to the bank and called for the stock; 4. That as a non-permanent building society it could not loan upon the security of its shares, and any by-laws to that effect are *ultra vires*; 5. That the declaration and pretended transfer contained in the note are of no avail, as transfers of stock could only be made in the manner prescribed by the society's regulations.

By-law 11 runs thus: "A cette fin, la société tiendra

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" un livre de transfer, et tout transport, pour être valable, " devra être signé par le cédant et le cessionnaire, et con- " tre-signé par le secrétaire. Aucun transport ne pourra " être fait avant que le cédant ait satisfait à toutes ses " obligations envers la société, et la société ne sera tenue " de reconnaître tel transport que lorsqu'il aura été fait " dans la forme et aux conditions prescrites par le présent " article." This by-law was in this and in all like cases made simply for the protection of the corporation, especially as between one of its members and itself. Even as between others it may be stated as an expression of the general law, that while no transfer of stock, unless made by sale under execution, is valid until entry thereof is made in the books, it would still be declaratory of and exhibit the rights of the parties thereto towards each other. R. S. Q., sec. 4683. Seeing that it is in *quasi* possession of its own shares, such a contract as is now challenged would, under any circumstances, surely be effective, even without the broad terms of the by-law which, if not *ultra vires*, makes shares impossible of transfer until the satisfaction of all the shareholders' obligations.

In the present case the form of the notes puts the terms of the loans beyond doubt, and emphasizes Picard's frauds. The society existed under C.S.L.C., cap. 69, and by the amending Act 42-33 Vic., cap. 32, sec. 4, was authorized to make loans on the security of its shares. The moment the directors knew of Picard's frauds a tender was made to the bank of the amount of its loans, and the return of the stock called for. This was necessary, for, as regarded the bank, the transfers were good. At first the bank declined to do more than discharge the debt, refusing to hand over the stock without Picard's concurrence. Later on, however, it took payment and subrogated the society. I cannot see that in either of these incidents there was any acquiescence in the frauds committed upon the society; on the contrary, both the deed of protest and the deed of subrogation contain special reserves of all its rights. Nor does it avail anything to the plaintiffs that the secretary, in an account dated Decem-

ber, 1885, and a claim dated 25th April, 1887, made mention of the bank transfer. These were his own personal acts, which as to the first did not bring knowledge home to the directors, and as to the second operated no waiver.

In the presence of Picard's hateful system of fraud toward the society, his use of his authority as a member and a director to tempt the secretary-treasurer into a betrayal of his office, and his obtainment of loans on the security of stock secretly handed over to the bank, it would indeed require a peremptory bidding on the part of the law or an irresistible series of facts to induce a court to sacrifice the society so that Picard's estate might benefit by his dishonesty.

Plaintiffs' action is dismissed with costs, and defendant, as prayed by its pleas, is permitted to hold on to the shares until repayment of $1,500 paid by it to the bank, and $3,744, amount of its loans to Picard.

The *considérants* of the judgment appealed from were as follows:—

"Seeing plaintiffs take this action in their quality of curator to the insolvent estate of C. F. Picard, deposit $1,664.43, and pray that twenty certain shares of the defendant's stock be declared their property and the defendant be ordered to so enter the shares upon its books, or, on defendant not so doing, be condemned to pay $4,000;

"Seeing defendant, by reason of the facts set forth in its pleas, declares its readiness to so register, but only on payment of the said amount and interest by it paid to the Banque Ville-Marie, and of $2,740, amount of loans received from the society by Picard, with interest;

"Considering that as collateral security for loans aggregating $1,550, Picard on the 17th March, 1882, transferred ten shares of defendant's stock known as livret 274, and on the 22nd December following ten other shares known as livret 22 to the Banque Ville-Marie;

"Considering that said transfers having been, as required by by-law 11, entered in the transfer book signed by the transferor and transferee, and countersigned by

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the secretary-treasurer, were, as regards the bank, in good faith and indisputable;

"Considering that at the time of said transfers Picard owed arrears for said stock and was indebted to the society for loans made on the security thereof, and the said transfers were made, in defiance of said by-law, without the knowledge of the society's directors;

"Considering again that Picard was a member and director of the said society, and seemed to have charge of the books thereof, and fraudulently imposed his authority upon the secretary-treasurer, whereby, under certain false pretences as to immediate payment of the bank, the latter was fraudulently induced to betray the duties of his office and to secretly make said transfers;

"Considering that by reason of said collusion, and of divers other devices of Picard, the society's board only became aware of said transfers in February, 1886, and thereupon protested all concerned under reserve of its rights, tendered to the bank the amount to it due, and called for the return of the stock, which the bank refused unless with Picard's concurrence;

"Considering that on the 11th of March, 1887, the bank consented to said retransfer, and acknowledging the receipt of $1,649.90 from the society, subrogated the latter in all its rights as it is admitted by plaintiffs;

"Considering that neither said protest nor said subrogation operated any waiver or destruction of the defendant's original rights;

"Considering that by said subrogation defendants are entitled to exercise and are in possession of all the rights of the Banque Ville-Marie;

"Considering that on the 25th of February, 1885, Picard owed the defendants for loans and renewals $3,744, as shown by the note, defendant's exhibit No. 1;

"Considering as appears by said note and the evidence, that this and each preceding transaction were specially secured by the said stock of Picard, which the defendant either held, or, though the devices of Picard, believed it held;

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"Considering that the said agreement was effective as between the parties thereto, and was declaratory of and exhibited their rights towards each other;

"Considering that the defendant was organized under the Consolidated Statutes of Lower Canada, chap. 69, and by the amending Act, 42-43 Vict., chap. 32, sec. 4, was allowed to loan on the security of its stock;

"Considering that by-law 11 was not *ultra vires*, and that as a member of the society Picard acquiesced therein and assented thereto;

"Considering that the claims dated December, 1885, and 25th of April, 1887, in the hand-writing of the defendant's secretary-treasurer, were made without the authority or knowledge of the directors, and in any event do not bar defendant from its rights;

"Considering the plaintiffs as representing Picard's estate are not entitled to benefit by his fraud upon defendants;

"Considering that defendant has proved the material allegations of its pleas, and that plaintiffs' tender is insufficient;

"Doth maintain the said plea; doth grant *acte* to the defendant of its declaration that it is ready to give back and deliver to plaintiff *ès-qualité* the said thirty shares of $200 each, known under *livret* numbers 274 and 22, as well as the notes mentioned in the declaration, upon said plaintiffs *ès-qualité* paying to defendant the sum of $3,744 with interest thereon from the 25th day of February, 1885, until paid, and the further sum of $1,664.43, amount of the deposit made in this cause, with interest and costs; doth declare the said transfers of the 17th May and 22nd December, 1882, of said twenty shares under numbers 22 and 274, made by said Charles Trefflé Picard to the said Banque Ville-Marie, null and void as regards the said defendant and the plaintiffs *ès-qualité*, with costs."

Nov. 17, 1890.]

Béique, Q.C., for the appellants.

M. E. Charpentier for the respondent.

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CROSS, J., delivered the judgment of the Court, which reversed the judgment appealed from for the reasons which follow :—

"Considering that the twenty certain shares of the capital stock of the said Société Canadienne-Française de Construction de Montréal, claimed by the appellants by their present action, were originally the property of Charles Trefflé Picard, heretofore a member and director of the said society, but latterly an insolvent ;

"Considering that as collateral security for loans aggregating $1,550, the said Picard, on the 17th March, 1882, transferred ten of the said shares, known as *livret* 274, and on 22nd December following, ten other of the said shares, known as *livret* 22, to the Banque Ville-Marie, by transfers duly registered in the transfer book of the said society, whereby the possession of the said shares passed from the said Picard to the said Banque Ville-Marie with the sanction of the said society, manifested by the act and signature of their secretary-treasurer, keeper of said transfer book, whereby the possession of said shares passed to the said Banque Ville-Marie, subject to be restored to the said Picard on payment of said advances, and could not for want of possession constitute a pledge in favor of the said society, by reason of any provision in their by-laws or otherwise, for any debt heretofore or thereafter created by the said Picard towards the said society ;

"Considering that the right to recover the said shares from the said bank, on payment of its advances thereon, was vested in said Picard, and passed to his creditors upon his insolvency ;

"Considering that long before the 11th March, 1887, the said Picard had become insolvent, having, on the 14th November, 1885, as such insolvent made an assignment of his estate and effects for the benefit of his creditors, and, after such insolvency, it was not competent for the said society to acquire any privilege or pledge over the said shares, to the prejudice of the creditors of the

said Picard, by paying the claim of the said Banque Ville-Marie, for the advances made by it to the said Picard, on the security of the said shares, and getting subrogated in the rights of the said bank by transfer from the said bank to the said society, made on the 11th March, 1887, other than to be reimbursed the amount thus paid, to wit, the sum of $1,550 and interest thereon ;

"Considering that the appellants, on the 7th May, 1887, duly tendered to the said society the said sum of $1,550 and interest, demanding that said society should register the said shares in their books in the name of the appellants in their said quality ;

"Considering that upon the insolvency of the said Picard, the right theretofore vested in him, to recover from the said bank the said shares upon payment of its said advances, devolved upon the appellants in their said qualities, as representing the creditors of the said Picard, and the consequent right to recover the same shares from the said society to whom they have been so passed by transfer from the said bank ;

"Considering that in the judgment rendered in this cause by the Superior Court at Montreal on the 9th May, 1889, there is error, the Court now here doth cancel, annul and set aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth declare the said tender so made by the appellants to the said society on the 7th May, 1887, good and valid, and doth declare the said twenty certain shares of the capital stock of the said society, to be the property of the said appellants in their said quality. and doth further order the said respondents, within ten days after service upon them of the present judgment, to enter and register the said shares in their books, as the property of them the said appellants in their said quality, and in default thereof to pay to the appellants in their said quality the sum of $4,000 with interest from the date of such default, in which sum and interest the respondents are in such case condemned and

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held to pay, the whole with costs as well of this Court as of the said Superior Court.

Béique, Lafontaine & Turgeon for appellants.

M. E. Charpentier for respondent.

(J. K.)

January 24, 1891.

Coram CROSS, BABY, BOSSÉ, JJ., TAIT, J. *ad hoc.*

JAMES H. MERRILL,

(*Plaintiff in Court below*),

APPELLANT;

AND

H. M. RIDER,

(*Defendant in Court below*),

RESPONDENT.

Water course—Right to control flow of water.

The parties are owners of mills situated upon the same stream (neither navigable nor floatable), which is the outlet of a pond. They derived title from the same *auteur*. Respondent owned the dam and the land at the outlet, and also a sawmill and a saw and grist mill, some distance down the stream, and below appellant's mill. Respondent's title was anterior to that of appellant, and gave right "of taking and "using the water from the pond, down to low water level on the dam "on the sold land, without hindrance or obstruction on the part of "the said vendor, his heirs or assigns." Appellant, who had a saw mill below respondent's dam at the outlet of the pond, took his title subject to this privilege.

HELD:—That respondent was entitled, under the clause above cited, to control the flow of the water from the pond, and to the use of the surplus water, down to low water level on the dam at the outlet.

APPEAL from a judgment of the Superior Court, district of St. Francis (DOHERTY, J.), June 27, 1887, dismissing the appellant's action.

The judgment of the Court below was in these terms:—

"Seeing that this action was instituted by plaintiff to recover damages from defendant, upon three grounds.

First, for loss of time of himself and men ; second, for loss of earnings of his (plaintiff's) saw mill ; and third, for injury sustained in his business reputation ; that the parties are mill owners on the stream or river in question in this cause, the plaintiff of a saw mill, and defendant of two such mills and a grist or flouring mill, the former situated higher up on said stream than the latter, although the latter's dam is higher up and above that of the former on said stream. And seeing that said damages are so claimed for that plaintiff alleges that defendant hath so improperly and illegally managed and used his said dam as to unjustly deprive him, plaintiff, of the use of such water running from and out of a certain pond called "Lovering Pond," at the mouth of which defendant's said dam is built ; said pond being higher up than said dams, and on which both of said dams depend for their supply of water and motive power for their mills respectively ;

"And seeing that defendant hath pleaded to this action that his dam was so built, over fifty years before this action was instituted, by the then owners of his said mills, and that it was always their property, and they had ever since rightfully the management and control of the water of said pond through the medium of their said dam, and that they had, when this action was instituted, acquired by prescription as well as by title, granted to them in the year 1879, the right to control, use and take the water from said pond for their mills down to low water level in said pond, and that plaintiff became a party to said title deed by agreeing to and confirming defendant's said title deed giving him such use and control of said water by one James W. House, their common *auteur*, from whom plaintiff also purchased his mill after sale and title by said House to defendant. And further, that plaintiff by so recognizing defendant's rights to the water down to low water level by preference and privilege, had thereby consented to the servitude so imposed on plaintiff's property by their said common *auteur* in favor of defendant and his said mills, and upon and against plaintiff and

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his mill and property. And further defendant denies that he had controlled or used said water in any way contrary to his right in the matter under said deeds and rights so acquired as aforesaid, and that he was not therefore guilty of any malfeasance, nor liable to plaintiff to damages as claimed by him;

"And considering that plaintiff hath failed to establish the material allegations of his declaration, and more particularly that defendant in exercising his right of preference to take and use said water to low level of said pond, and in his management thereof, had done so carelessly, abusively, or wantonly for the purpose of injuring him, plaintiff, or of depriving him of any right he had by title or otherwise, to the use of his fair share of said water;

"And considering that the water of said pond being limited in quantities and insufficient in volume to furnish motive power to said mills and others entitled thereto, situate on said stream, in itself, as a river, of comparatively small propelling power, continuously in full supply, it was necessary, as among so many competitors therefor, that it should be carefully attended to and managed by some one entitled to and responsible for the control thereof; and considering that it is proved that defendant and his *auteurs*, as owners of his said mills and of said Lovering dam, always had and were best entitled to said management and control;

"And considering that in view of the insufficiency of the water to supply the full demand of the number of mills entitled to their shares thereof, and the small resources on which said pond had to depend for its replenishment if drawn to low water level, as defendant had right to do, it was in the interest of plaintiff and others so entitled that defendant should not exercise his rights to the full extent in this respect by so taking to low level, thus exposing all parties to an almost absolute want of water whilst the same was again slowly rising to the height of usefulness to all parties interested;

"Considering that it is proved by plaintiff's evidence that

thirty-six days of such continuous use of the water, as plaintiff claimed, would empty said pond for all practical and useful purposes, and that it was not and could not be for the benefit of plaintiff or any of such others interested, that defendant should have drawn the water of said pond much lower than he did, and that upon the whole he was fairly consulting the interest of those interested in not so doing, more particularly as his own mills required more water than plaintiff's, and were dependent therefor for the quantity which must necessarily pass through plaintiff's dam to those below; and considering therefore that defendant was acting firmly and and judiciously in economizing and in preventing waste of the water in the manner complained of by plaintiff, and that his doings in and about the control and use of said water under the circumstances, and his rights therein acquired and so long exercised, were within his competency, in the best interest of all concerned, and no aggravation of the servitude so imposed by the said common vendor to and *auteur* of both plaintiff and defendant in regard to the properties in question in this cause;

"And considering further that plaintiff has failed to make legal, accurate or sufficient proof of any specific damages legally appreciable in money for or by reason of anything done in the premises by defendant, and that the vague and irrelevant evidence offered by him in most cases has been obtained by answers to hypothetical questions, the assumptions of which are not proved, and which go beyond the allegations of the declaration;

"And considering that most of plaintiff's evidence, offered to establish his alleged damages, is made on assumed and unproved premises, such as that he was wholly deprived of water during six or seven months of the year, of which premises there is no proof, nor is it so alleged or claimed by plaintiff's declaration, and that as matter of fact plaintiff has not made good the essential allegations of his declaration, nor proved any specific or definite amount of damages for which this Court can give him judgment;

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"And considering that defendant has proved the material allegations of his pleas and defence, maintaining said pleas, doth dismiss this action with costs."

TAIT, J. (for the Court) :—

The appellant appeals from a judgment of the Superior Court, district of St. Francis, by which his action against respondent was dismissed.

The litigants are owners of mills situated upon a stream of water, being the outlet of a pond in the township of Stanstead called "Lovering Pond," and the dispute is about the control of the water. The distance from the outlet to Fitch bay, on Lake Memphremagog, into which the stream empties, is about two and a half miles. The respondent owns the dam and the land at the outlet. The appellant has a dam and a sawmill a few rods below the outlet, while about one and a half miles further down the stream, the respondent has a sawmill, and again, about another half mile further down, he has a saw and grist mill.

The water from the pond, after passing through the main dam at the outlet belonging to respondent, must pass through appellant's dam and mill before it reaches the respondent's mills.

The appellant complains that the respondent has, without right, controlled the water of the pond to his damage. He alleges that respondent, having rebuilt the bulkhead across the lower end of the pond (connected with the dam on each side) placed extra plank therein and fastened them down with lock and key by day and by night, thereby stopping the flow of the water from the pond, diverting its course and needlessly preventing appellant's having any water in his pond except such as leaked through or ran over the top, or occasionally when respondent (to suit his own wants) would allow the water to pass. The damages are alleged to have been mainly suffered during the season of 1886, from the month of May onwards, and to have consisted in loss of time of himself and men, $200; loss of earnings of mill, $1,500;

loss of reputation in business, $300, making altogether $3,000.

This stream is certainly not navigable; it is about ten feet wide and single logs can only be floated down with assistance, so that it can hardly be called a floatable river either. There is no doubt that the respondent did control the flow of the water out of the pond during the time in question. The bulkhead situated in the middle of the the dam was arranged with grooved posts on each side, and the space between the posts could be filled up with planks let down. By putting down or taking off these planks the respondent controlled the flow of water through the bulkhead, and in order that they could not be disturbed by anyone he had a contrivance by which the planks, at any height he might adjust them, could be held down under lock and key. The gist of the appellant's grievance is that, during the period of time complained of, respondent kept too much water back in the pond by keeping too many planks in the bulkhead.

The respondent says that the stream in question is neither navigable nor floatable; that he has not impeded the natural flow of the water of the stream, but has controlled the flow of the water artificially stored in the pond, as he had a perfect right to do, and as has been done for more than fifty years by the owners of the grist mill at Fitch Bay; that the dam in question was built by the man who built the grist mill over fifty years ago, and the ownership of the dam and the control of the water have always vested in the proprietor of the grist mill.

The respondent appears to have locked down the planks about the 24th of May, 1886, at which time, according to appellant's witness Rickard, there were about six feet of water at the bulkhead; from that time on respondent lowered or raised the planks from time to time, never retaining less than a depth of four feet On an average Rickard thinks there were ten or eleven inches of water running over the bulkhead from May to December.

The appellant says the respondent had no right to con-

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trol the water in the way he did; that it was wholly unnecessary to retain such a depth of water, that is over four feet at the bulkhead, and that if the water had been properly managed there would have been ample for the business of all the mills.

By the judgment of the first court it was held in substance that the respondent had a right of preference to take and use the water to low level of the pond; that he had not abused his privilege; that it was necessary among so many competitors that the water should be carefully managed by some one entitled to the control thereof; that defendant and his *auteurs*, as owners of his mills and the Lovering dam, always had, and were best entitled to, such management and control; that respondent had acted in the best interest of all concerned in doing as he did; and that, moreover, no damage appreciable in money had been proved.

As the respondent claims that he has a preference to the water, as against appellant, by virtue of his title, which came from their common *auteur*, it becomes necessary to refer briefly to the respective titles of the parties. On the 7th November, 1879, one James W. House was the owner of all the mills and dams now owned by appellant and respondent respectively. On that date he sold respondent and his brother, T. B. Rider, the property on which the Lovering dam is constructed, as well as the grist and saw mills now owned by respondent alone, "together with the right and privilege to the said pur-"chasers, their heirs and assigns, at all times hereafter, "of taking and using the water from the pond known as "Lovering pond, down to low water level at the dam on "the hereby sold land, without hindrance or obstruction "on the part of the said vendor, his heirs or assigns. The "said vendor hereby reserving the right and privilege of "floating or driving saw logs through the said dam, in "the raceway provided for that purpose, whenever there "is high water sufficient for so doing, without causing "any unnecessary waste of water, and by the said vendor "giving to said purchasers twenty-four hours' notice of his

" intention to run such sawlogs." To this deed one Horace Stewart was a party as surety of the vendor in favor of purchasers against all evictions and troubles. In February, 1881, House sold to Stewart the mill now owned by appellant, together with other property, and in this deed there appears the following clause:—"The said purchaser " hereby binding himself, his heirs and *ayants cause*, to " observe, abide by and fulfil all the conditions and agree- " ments binding upon the said vendor with respect to " water privileges mentioned and contained in a certain " deed of sale of part of the lot No. 21, in the fifth range, " and part of the north half of the lot No. 26 in the seventh " range of lots, in the said township of Stanstead, here- " tofore granted by the said James W. House to the firm " of T. B. & H. M. Rider, the whole to the perfect exon- " eration of the said vendor, his heirs and assigns for- " ever." In October, 1881, Stewart leased to appellant, with the condition that he could purchase at any time before the expiration of three years for the price of $1,250. In July, 1882, the Riders registered a notice stating that a servitude had been created in their favor by the deed of sale to them, that is, the right of taking and using the water in said pond down to low water level at the dam, etc., and that such servitude affected the land owned by House and sold to Stewart. Afterwards, in May, 1884, T. B. Rider sold his interest in the properties and privileges acquired from House to respondent; and finally, in October, 1884, the executors of Stewart who had died, executed a deed of sale in favor of appellant, in pursuance of the promise of sale contained in the lease, but for the reduced consideration of $1,000. The reason of the reduction is explained by Mr. D. H. Merrill, appellant's father.

Q.—Your son had bonded this property from the Stewart estate prior to purchase, had he not?

A.—Yes, sir.

Q.—At the time of taking the deed there was a trouble between your son and the executors of the Stewart estate, was there not, in reference to the property?

A.—There was.

Q.—What was the trouble?

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A.—When my son bonded that property from Mr. Horace Stewart, he bonded it for three years with the right of purchasing that property any time within the three years, at a certain price.

Q.—And there was no reference in the agreement, but that it was to be free and clear from all encumbrance?

A.—There was no mention of anything else. There was no mention of Rider's servitude.

Q.—And?

A.—And when my son went to close the deed, the executors of the Stewart estate were ready to deed their rights. He declined to take it. And after some talk, Mr. Kathan, the executor, made a proposition to take $1,000; that would be a deduction of $250, and to deed it subject to Mr. Rider's rights.

Q.—A deduction was then made of $250 you said?

A.—Yes, sir.

Accordingly there appears in appellant's deed the following clause: "And the said purchaser doth hereby "bind himself, his heirs and *ayants cause* to observe, abide "by and fulfil all the conditions and agreements binding "upon the said vendors with respect to water privilege "mentioned and contained in a certain deed of sale of "part of lot number 21 in the fifth range, and part of the "north half of lot number 26 in the seventh range of "Stanstead aforesaid, heretofore granted by James W. "House to the firm of T. B. & H. M. Rider, the whole to "the perfect exoneration of the said vendors *es dite qualité* "and their successors and assigns forever."

The appellant and respondent therefore acquired from the same *auteur*—appellant's title being subsequent to that of respondent, and subject to whatever rights and control may have been given to him over the water of Lovering pond, by virtue of the clause in his deed of acquisition already cited.

The respondent contends that by virtue of the clause in the deed from House to the Riders, by which they were given the right and privilege at all times "of taking "and using the water from the pond known as Lovering "pond down to low water level on the dam on the sold "land without hindrance or obstruction on the part of "the said vendor, his heirs or assigns," he had a right to retain any accumulation of water in the pond under lock

and key and run it out to suit his convenience. He says this clause gave, and was clearly intended to give, respondent and his brother the control of the water held by the dam for the use of their mills below, subject to right of running logs to the vendor's (now appellant's) sawmill, lying between the dam and the mills at Fitch bay. That is to say, the vendor expressly made the saw mill retained by him subservient to the mills below, as to the use of the water stored by the dam in Lovering pond.

The appellant has, no doubt, recognized the right of the respondent to have a dam and to store water therein, for otherwise what use was the privilege of drawing water out of it down to low water level if he had no right to accumulate it? The clause appears to give respondent a preference upon the surplus water so accumulated. Perhaps it would be going too far to say that after this pond is filled up in the spring, and the water is far above low level, respondent could shut it in and let none escape during the summer; but respondent did not so deal with the water. On May 25th, the day after the bulkhead was locked, the depth of water there was 6 feet 3½ inches; on September 24th, 4 feet 4 inches; October 28th, 4 feet 2½ inches, so that during the summer it diminished about two feet. And the average flow over the bulkhead down the river was between ten and eleven inches. These figures are given by Mr. Rickard, appellant's witness, who, however, is unable to say during what period of the year the mills could operate if there had been no Lovering dam, or whether more or less than the natural flow of the water passed down the stream during the season the damage complained of was suffered. Even supposing that the court could not give so favorable an interpretation to respondent's title as he himself does, it would seem that in any case the appellant, in order to recover damages, should show that respondent withheld more water than would naturally have flowed during the season complained of. But appellant has not shown that he did not get a quantity of water equivalent

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to the natural flow. He proves and complains that he did not get all the surplus water. Some witnesses have stated that more water than usual was retained, and more than was necessary. The respondent may have been a little over-prudent, but it is not shown that he acted maliciously, and if he was entitled to store water at all for the benefit and use of his grist mill, he must be entitled to a certain latitude of discretion. A great deal depends upon the season, the sources of supply, and other circumstances.

As I understand the evidence the surplus water in this pond at a depth of, say, four feet at the bulkhead, would have been exhausted by appellant's two wheels in about thirty-six days of ten hours a day. If appellant was entitled to draw out surplus water in this way, of what use was the privilege given respondent by his deed and acquiesced in by appellant? The result would be that appellant would get the benefit of the water for his saw-mill, and the respondent's grist mill, which is operated later in the year, would probably be left without water. There is a good deal of evidence going to show that even before respondent's acquisition of the property the Lovering dam was controlled by the owner of the grist mill. Appellant's witness, Adam J. Taylor, aged 55, who has lived by the pond all his life and who worked appellant's mill six years, says the dam and bulkhead in question have always as far as he knows, been controlled by the proprietor of the grist mill. William Lenney, who has known the premises some 25 years, and Erastus Lee aged 54, whose father built the dam and who has lived there all his life, and who owned at one time the respondent's mills, and other witnesses, say the dam was always controlled by the lower mill. With the clause in the deed and this long continued usage in respondent's favor, appellant had to make out a clear case for damages. I must say that I am unable to come to the conclusion that retention of the quantity of surplus water complained of gave rise to damages. Apart from this aspect of the case the evidence as to damages is of the very vaguest descrip-

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tion. The witnesses, except appellant's father, all avoid giving any estimate of damages. The father says $5 a day, but his cross examination shows this estimate to be wholly unreliable. House, in answer to a hypothetical question, speaks of $10 a day. On the other hand, there is considerable evidence to the effect that appellant having increased the capacity of his mill did a larger business in 1886, than he ever did before.

Upon the whole I think the judgment should be confirmed.

Judgment confirmed.

Joseph L. Terrill for appellant.

Ives, Brown & French for respondent.

(J. K.)

March 26, 1890.

Coram DORION, C.J., CROSS, BABY, BOSSÉ, JJ.

JOHN GERHARDT,
(Defendant in Court below),
APPELLANT;

AND

SAMUEL DAVIS ET AL.,
(Plaintiffs in Court below),
RESPONDENTS.

Partnership—Action for dissolution pending—Appointment of liquidator.

HELD:—The fact that an action is pending for the dissolution of a co-partnership, the management of the business of which, by the deed of co-partnership, was entrusted to the partner defendant, is not a sufficient ground for depriving him of the management, and for the appointment of a liquidator.

APPEAL from a judgment of the Superior Court, Montreal (LORANGER, J.), Oct. 8, 1888, as follows:—

"Having heard the parties by their respective counsel upon the petition filed on the 2nd of October instant by

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the plaintiffs, alleging that from the nature of the present complaint this action is likely to be prolonged; that the defendant, up to the present time, has the sole charge of the partnership existing between him and the said plaintiffs, the dissolution of which is asked by the said action; that said defendant is incurring large expenses in connection with the running of said business, and said plaintiffs are called upon to pay large sums of money on account of said business, and praying therefore, said plaintiffs, that a liquidator be appointed to the said partnership business; examined the proceedings and deliberated:

"I, the undersigned Judge, do grant the said petition, and I do appoint W. A. Caldwell, of Montreal, accountant, liquidator, to the said partnership business according to law, upon the said liquidator giving before the prothonotary of this Court two securities, to the amount of $4,000 each, that he will faithfully administer the said business, with costs against defendant."

Jan. 16, 1890.]

C. J. Doherty, *Q.C.*, and *H. J. Kavanagh*, for appellant:—

The plaintiffs (respondents), had taken an action against the appellant for the dissolution of a partnership existing between them under the name of The Canada Cigar Box Factory. Immediately on the return of this action respondents presented a petition to Mr. Justice Loranger in Chambers, asking for the appointment forthwith of a liquidator to this partnership business.

This proceeding was taken under the Provincial Statute 48 Vic., cap. 20, which provides that as soon as a partnership is dissolved, or as soon as a judicial demand for such dissolution has been made, the Court or Judge has power to appoint a liquidator.

The petition alleged in effect:—

That a great length of time must elapse before the Court can decide whether the partnership should be dissolved or not;—that in the meantime appellant alone is in possession and is incurring heavy expense, and that it would be in the interest of the partnership that a liquidator be forthwith appointed.

The appellant answered substantially that the petition does not show that any interest of the firm or of respondents is endangered, that any injury results from appellant's acts, or that respondents are suffering or will suffer any damage, nor that such a state of affairs exists as would justify the appointment of a liquidator; and further, that instead of being in the interest of the partnership, the appointment of a liquidator on the contrary would ruin the business by stopping it, estranging its custom and destroying its credit; and that the judgment prayed for by the petition would be equivalent to ordering that the affairs of the partnership be first wound up and its business liquidated and put an end to, leaving it to be decided after the whole object of the partnership had been destroyed, whether or not the partnership should be continued.

By a second answer the appellant stated his willingness that, for the greater security of respondents, an officer be appointed to take possession of the assets, provided that the business in all other respects be continued under the terms of the partnership articles.

In this state of the record, and without hearing of evidence, the judgment appealed from was rendered appointing Mr. Caldwell liquidator of the Canada Cigar Box Factory, and vesting in him all the assets of the business for the purpose of liquidation.

By the articles of partnership it was agreed that the appellant, whose practical knowledge and industry has made the business a profitable one, should have the general management of the factory, subject to the reasonable wishes of respondents. On this business he entirely depends for a livelihood, while to the respondents, who are the largest cigar manufacturers in the country, this little manufactory is a mere satellite of their own very extensive business, and of such little importance to them that they can afford to destroy it for the mere gratification of a passing whim. This partnership has existed since July, 1885, and would come to an end by the terms of the deed in about six months hence.

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As soon as the present appeal was taken, the appellant, under the provisions of the statute above cited, applied to two of the Honorable Judges of this Court to suspend the liquidation ordered by the judgment appealed from, and on the 31st October last the Chief Justice and Mr. Justice Church, after hearing the parties, ordered the suspension of the judgment.

The appellant's contention is that the allegations of the petition are wholly insufficient to warrant the appointment of a liquidator to a partnership business previous to the dissolution of the partnership, and moreover that even were these allegations sufficient, they are utterly unsupported by any evidence. To hold, as the judgment appealed from does, that a liquidator should be appointed in this cause, would be tantamount to holding that, without any investigation whatever, a liquidator should be appointed in all cases where a dissolution is asked for.

But in order to justify the appointment of a liquidator and to warrant a judgment taking the management of a running business out of the hands of the partner to whom, by agreement, it has been committed, as in the present case, very grave cause indeed must be shewn against the partner complained of.

II. *Lindley on Partnership*, p. 1057, (Third English Edition)—"Where, however, the partner complained of has "by agreement been constituted the active managing "partner, the Court will not interfere with him unless a "strong case be made out against him."

Idem, p. 1067.—"The reason given for this (reluctance "to exclude a partner from the management) is that each "partner is at the outset trusted by his co-partners and "has confidence reposed by them in him; and until it "can be shown that he ought not to be allowed to take "part any longer in the management of the partnership "affairs, the Court will not interfere with him."

Idem, p. 1069.—"The grounds on which the Court is "usually asked to appoint a receiver before dissolution, "are either because, by agreement, the partners have

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" divested themselves more or less of their right to wind " up the affairs of the concern; or because, by miscon- " duct, the right of personal intervention has been for- " feited, and the partnership funds are in danger of being " lost."

Goldstein, for the respondents:—

The action to dissolve the partnership was issued in virtue of Art. 1896 of the Civil Code. The petition for the appointment of the liquidator was presented under Art. 1896*a*, being an amendment to the law by 48 V., c. 20, s. 2, now Art. 5822 of the Revised Statutes of Quebec, which provides:

" If a partnership be dissolved or a judicial demand be " made for such dissolution, the Court or the Judge, upon " the demand of one of the partners, after notice given to " the others, has power to appoint one or more liquid- " ators". . . . . Proceedings respecting the appointment " of liquidators and the performance of the duties of their " office are summary."

This amendment to the law was clearly introduced to meet a long felt want and to grant relief to the parties in just such a case as this, where a partner having serious charges against his co-partner, having lost all confidence in him and having a good right of action to dissolve the partnership, seeks to protect his interests and the interests of the partnership business during the pendency of the action to dissolve, which action not being of a summary nature would be protracted and a long time necessarily elapse before a final judgment could be rendered.

On reference to the partnership deed it will be seen that the respondents had to supply and advance all the funds for the purposes of the business, and that the appellant's duties were to have charge of the manufacturing department and manage the business generally, subject to the wishes of the respondents, and it can easily be understood that once the variances and unalterable disagreement between the parties be acknowledged and utter loss of confidence admitted, and an action to dis-

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solve pending, it became absolutely necessary that a liquidator should be appointed.

It might be that a sequestrator could have been appointed, as under the French law the proceedings after dissolution were assimilated to the action *en partage* between the heirs of a succession, but the powers of a sequestrator are much more limited than would be beneficial in the case of a partnership, and the amendment grants greater latitude accordingly to the office of liquidator, which it has introduced.

It was a matter wholly in the discretion of the judge, and in granting that order, the respondents humbly submit that he exercised a wise discretion and that it should not be disturbed.

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The Court was of opinion to reverse, for the reasons stated in the judgment as follows :—

"Considering that by the act of co-partnership between the parties the management of the business of the co-partnership was left to the appellant in this cause ;

"And considering that a demand for dissolution of the co-partnership is no sufficient cause to deprive the appellant of the administration of the business, as provided by the deed of co-partnership, and that in their petition to appoint a liquidator the respondents have alleged no sufficient reason for such appointment, and that therefore the judgment rendered by the Superior Court was not justified by any of the said allegations, and that there is error in the judgment of the 8th October, 1888 ; this Court doth reverse the said judgment of the 8th October, 1888, and doth dismiss the petition of the said respondents for the appointment of a liquidator, with costs against the respondents on the said petition as well in the Court below as on the present appeal."

Judgment reversed.

H. J. Kavanagh for appellant.

Carter & Goldstein for respondents.

(J. K.)

November 27, 1890.

Coram DORION, C.J., BABY, BOSSÉ, DOHERTY, JJ.

RAOUL DANDURAND ES-QUAL.
(*Plaintiff par reprise d'instance*),
APPELLANT;

AND

FRED. T. MAPPIN,
(*Defendant below*),
RESPONDENT.

Sale of real estate—Purchaser buying free and clear—Hypothecs.

HELD:—Where real estate is sold free and clear of incumbrances, the purchaser to pay the price in cash to the vendor, and it appears that the property is charged with hypothecs, the purchaser is not bound to execute a deed unless the vendor, within the time fixed for completing the contract, has caused the hypothecs to be discharged.

After the judgment rendered in appeal, M. L. R., 5 Q. B. 108, setting aside the judgment of the Superior Court, M. L. R., 3 S. C. 393, the case went back to the Superior Court where the curator, R. Dandurand, took up the *instance*, and after some further evidence had been adduced, the following judgment was rendered by LORANGER, J., March 12, 1890:—

"Attendu que le demandeur par reprise d'instance, curateur nommé en justice à Dame Harriett C. Greene, veuve et légataire universelle de feu Joseph Doutre, en son vivant conseil de la Reine, de Montréal, réclame la somme de $9,500, prix de vente d'un immeuble, que la dite Dame Greene prétend avoir vendu au défendeur, le 24 avril 1886;

"Attendu que le défendeur plaide: 1o. qu'il n'y a pas eu vente, mais seulement offre d'acheter, de sa part, et que cette offre n'a pas été acceptée; 2o. que dans l'offre qu'il a faite, il a stipulé comme une des conditions essentielles, que la venderesse serait obligée de lui donner un titre par-

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fait et clair de toutes charges et hypothèques ; qu'à l'époque fixée pour la préparation du contrat de vente, l'immeuble était grevé d'hypothèques pour un montant excédant $5,000, et que la venderesse était incapable de se conformer à la condition susdite ; que si l'écrit intervenu entre les parties doit être interprété comme une vente, l'action doit être renvoyée, attendu que la demanderesse Dame Greene, n'était pas, lorsqu'elle l'a intentée, et n'est pas encore en position de remplir sa part d'obligation ; 3o. que la prétendue vente a été faite sur les représentations de la dite Dame Greene, que la maison construite sur le dit immeuble était en entier faite en briques, et devait être payée au prix d'une construction de ce genre, tandis qu'en réalité, ce n'est qu'une maison faite en bois et recouverte en briques ; que le consentement du défendeur a été obtenu par erreur et sur de fausses représentations, et qu'en conséquence le contrat est nul ;

"Considérant qu'il est prouvé que la dite Dame Greene, représentée par son agent le nommé Turner, a publié dans les journaux de cette ville, dans le cours de février 1886, des avis annonçant la vente de l'immeuble en question, dans les termes suivants :—*Charming Villa residence, 'Rose Arden,' Cote St. Antoine. The subscriber will sell at his room on account of Estate Joseph Doutre, Q. C., on Tuesday morning, the 2nd March, at 11 o'clock, the above spacious brick residence, with ample grounds ;*

"Attendu que le 24 avril 1886, le défendeur a adressé et remis au dit Turner, la lettre suivante :

Montreal, 24th April, 1886.

'MR. A. B. TURNER,

'Agent for Estate Doutre, Montreal.

'SIR,—I undertake to take the house at Côte St. An-
'toine, the residence of the late Joseph Doutre, with the
'buildings and land, appurtenances, etc., for the price of
'$9,500, on receiving a perfect title to the same, payable
'in cash, and the deed to be executed from this to the
'first of August next. It is however, agreed and a con-
'dition absolute, that in case of my death before the term

'fixed, to wit, the first of August next, this promise of 'mine shall not bind my estate.

'Yours,

'FREDK. J. MAPPIN, JR.

"Considérant que le 24e jour de mai suivant (24 mai 1886), le défendeur écrivit au dit Turner, la lettre suivante:

'I am agreeable to buy the house on the terms you sti- 'pulated, so please have the necessary papers for inspec- 'tion. I do not care about taking the mortgage on, I 'would sooner pay you the sum, and give you the papers, '*saying the place is all paid for and free from debt*;'

"Considérant que le 14e jour de juillet 1886, la dite Dame Greene a, par l'entremise de Mtre. Normandeau, notaire, dénoncé au défendeur son intention et sa volonté de lui consentir un acte de vente du dit immeuble, dans des conditions arrêtées avec elle; l'a informé de plus que le projet d'acte de vente était préparé, le mettant en demeure de se transporter au bureau de Normandeau, pour le signer, mais que le défendeur a refusé d'acquiescer à ce protêt et à cette mise en demeure;

"Considérant que la dite Dame Greene avait effectivement fait préparer le dit projet d'acte de vente par le dit notaire, et le produit au soutien de sa demande comme exhibit No. 6;

"Considérant qu'il appert par ce projet d'acte, que l'on offre au demandeur comme un titre parfait et clair de toutes charges et hypothèques, que la vente est faite avec garantie de tous troubles, douaire, hypothèques et charges quelconques;

"Considérant qu'il appert par le certificat du régistrateur produit à l'enquête comme exhibit X de la dite Dame Greene, que le dit immeuble était grevé d'une hypothèque au montant de $5,000 en faveur du nommé Joyce, enregistré le 29 mai 1884, que la dite Dame Greene n'a pas offert par sa mise en demeure ni même par son action de décharger; qu'elle n'a pas dénoncé cette hypothèque dans le projet d'acte de vente susdit, comme elle l'a fait

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pour l'hypothèque de J. O. Joseph, écuier, afin d'offrir au défendeur l'occasion de la payer ou se protéger contre cette charge, sur et à même le prix de vente ;

"Considérant que ce ne fut que longtemps après le retour de l'action, que la demanderesse, Dame Greene, a offert au défendeur une décharge de l'hypothèque du dit Alfred Joyce ; que cette décharge produite au dossier comme exhibit H de la dite Dame Greene, n'est pas même signée par le dit Joyce ; qu'au reste elle a été faite longtemps après l'expiration des délais durant lesquels le défendeur s'était obligé de prendre son titre d'acquisition ;

"Considérant qu'à l'époque convenue entre les parties pour la passation du dit acte de vente, la dite Dame Greene n'était pas en état de donner au défendeur un titre parfait et libre de toutes les charges et hypothèques qui affectaient le dit immeuble ; qu'elle ne l'a pas offert par son action, et ne s'est pas mise en position de le donner depuis ;

"Considérant que le défendeur a acheté l'immeuble en question sur la foi des avis publiés dans les journaux, représentant la maison y érigée comme une bâtisse en briques, tandis qu'en réalité elle n'est qu'une maison en bois recouverte en briques ; qu'il est vrai qu'il en a fait l'examen avant de signer le dit écrit, mais que cet examen n'a été qu'imparfait, et le défendeur qui est un étranger et un homme sans expérience dans la construction des bâtisses, s'en est rapporté à l'apparence extérieure de la maison et aux annonces en question ; que ce ne fut que dans le mois de juin qu'il constata que la dite maison n'était pas en briques solides ;

"Considérant qu'il est établi en preuve que la différence dans la valeur et la qualité d'une construction de ce genre et une maison toute en briques est considérable, et qu'il y a eu erreur sur une des considérations principales qui ont engagé le défendeur à signer le dit écrit du 24 avril 1886 ;

"Vu l'article 992, C. C. ;

"Considérant que le demandeur par reprise d'instance

n'a pas prouvé les allégations essentielles de sa déclaration et que le défendeur a prouvé celles de sa défense ;

" Maintient la dite défense et renvoie la dite action avec dépens."

The plaintiff *par reprise d'instance* appealed from the above judgment, and the case was submitted on the factums.

BOSSÉ, J., delivering the unanimous judgment of the Court, remarked that it was not necessary to decide the question of misrepresentation as to the construction of the house. The objection raised by the purchaser, that the property was sold free and clear of incumbrances, while in fact it was charged with hypothecs which the vendor did not remove, before asking for the completion of the contract, was fatal, and the appeal must be dismissed on this ground.

Judgment confirmed.

R. Dandurand for appellant.

Maclaren, Leet, Smith & Smith for respondent.

(J. K.)

March 21, 1891.

Coram CROSS, BABY, BOSSÉ, DOHERTY, CIMON, JJ.

ACCIDENT INSURANCE CO. OF N. A.,
(*Defendants in Court below*),
APPELLANTS;

AND

DAME ELIZABETH YOUNG,
(*Plaintiff in Court below*),
RESPONDENT.

Accident Insurance—External injuries producing erysipelas—Proximate cause of death—Immediate notice of death—Waiver.

An accident policy issued by the appellants was payable " within thirty " days after sufficient proof that the insured, at any time during the " continuance of this policy, shall have sustained bodily injuries

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"effected through *external, accidental and violent means*, within the "intent and meaning of this contract and the conditions hereunto "annexed, *and such injuries alone shall have occasioned death* within "ninety days from the happening thereof. . . . . Provided always "that this insurance shall not extend to hernia, *nor to any bodily "injury happening directly or indirectly in consequence of disease, nor to "any death or disability which may have been caused wholly or in part "by bodily infirmities or disease*, existing prior or subsequent to the "date of this contract, or by the taking of poison, or by any surgical "operation, or medical or mechanical treatment, *nor to any case ex-"cept where the injury aforesaid is the proximate or sole cause of the dis-"ability or death.*"

The insured was accidentally wounded in the leg by falling from a verandah, and within four or five days the wound, which appeared at first to be a slight one, was complicated by erysipelas, from which death ensued twenty-three days after the accident. There was some conflict in the evidence as to whether the erysipelas resulted solely from the wound, but the Court below found, on the facts, that the erysipelas followed as a direct result from the external injury.

HELD:—(Affirming the judgment of Tellier, J., M. L. R., 6 S. C. 3), That the external injury was the proximate or sole cause of death within the meaning of the policy, and that the respondent was entitled to recover.

The policy also provided that "in the event of any accident or injury for "which claim may be made under this policy, immediate notice "must be given in writing, addressed to the manager of this com-"pany, at Montreal, stating full name, occupation and address of "the insured, with full particulars of the accident and injury; and "failure to give such immediate written notice shall invalidate all "claims under this policy."

The local agent of the company at Simcoe, Ont., after receiving written notice of the accident before death, was verbally informed of the death four days after it took place, and thereupon stated that he would require no further notice, and that he had advised the company. Further interviews and correspondence took place during the following days between the local agent and the claimants with respect to the papers required, but the formal notice was not sent to the head office until sixteen days after death. The manager of the company acknowledged receipt of proofs of death, without complaining of want of notice, and ultimately declined to pay the claim on the ground that the death was caused by disease, and that therefore the company could not recognize their liability.

HELD:—2. That the company had received sufficient notice of death to satisfy the requirements of the policy, and that, in any event, they had expressly waived any objections which they might have urged in this regard, by declining to pay the claim on other grounds.

APPEAL from a judgment of the Superior Court, Mon-

treal (TELLIER, J.), Sept. 13, 1889, reported in M. L. R., 6 S. C. 3.

Jan. 22, 1891.]

Hatton, Q.C., and *Geoffrion*, Q.C., for the appellants, contended that the accident was not the sole or proximate cause of the death, as the contract provided. The death was not occasioned by the injury alone, independently of all other causes, inasmuch as erysipelas intervened and was the direct cause of the death. If the respondent were suing for injuries received through negligence, which injuries resulted in death, the case would be different. But here the action was on a contract which stipulated that the company should not be liable when death was caused wholly or in part by disease, but only when the proximate or sole cause was the injury received by accident. The action should also fail for want of immediate notice. The notice in this case was given sixteen days after the death of the insured, and about twelve days after his burial. The reason why immediate notice is required is that the company is interested in seeing that proper medical aid is furnished. It has the right to have its own medical adviser attend, in order, not only that the accident may be properly treated, but that the company may have full knowledge of the circumstances. Where notice is given long after the burial, *post mortem* changes may occur which may obscure the cause of death, and render the identification of the body difficult or even impossible.

E Lafleur, for the respondent, contended that there had been waiver of notice under the facts stated in the head note. Also, that the accident was the proximate or sole cause of death within the meaning of the policy.

CROSS, J., said the question was whether the party insured having died from erysipelas, consequent upon an accidental fall, his widow was excluded from the benefit of the policy. It was to be remarked that erysipelas was not specially excluded by the contract. If the appellants' construction prevailed, no matter how seriously a party

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might be injured by a railway accident, if he did not die from the shock, but died afterwards from erysipelas or gangrene which resulted from his injuries, there would be no right to recover. The Court was of opinion that in such case the accident might be considered the proximate cause of death, and the insurers were liable. Where a blow is given which need not necessarily cause death, but through some neglect in the treatment death ensues, there is a criminal responsibility, and the person who inflicted the blow is amenable to the law. If Wilson had not met with this fall, would he have died of erysipelas? The evidence was insufficient to show that he would, although there was some evidence that he suffered from ailments which might make him susceptible to erysipelas. Another ground had been urged by the appellants, that immediate notice of the death had not been given. The Court considered that the company had waived this objection by the correspondence which had taken place.

Judgment confirmed.[1]

Hatton & McLennan for appellants.

E. Lafleur for respondent.

(J. K.)

[1] On appeal to the Supreme Court of Canada, the above judgment was reversed, April 4, 1892, Fournier and Patterson, JJ., dissenting. See 15 Leg. News, 150.

November 27, 1890.

Coram DORION, C.J., TESSIER, BABY, BOSSÉ, DOHERTY, JJ.

JAMES D. WELLS,
(*Defendant and contestant below*),
APPELLANT;

AND

CHARLES S. BURROUGHS,
(*Plaintiff and opposant below*),
RESPONDENT.

Procedure—Execution of judgment of the Court of Queen's Bench in appeal—Registration—Taxation of costs.

HELD:—1. That a judgment rendered by the Court of Queen's Bench sitting in appeal, is executory without the formality of registration in the office of the Court from which the appeal was taken.

2. Where the taxation of costs in appeal is regular on its face, and there is no proof of alleged want of notice to the adverse party, such taxation will be maintained.

APPEAL from a judgment of the Superior Court, district of Terrebonne (TASCHEREAU, J.), June 14, 1889, maintaining an opposition *afin d'annuler*.

The judgment of the Court below reads as follows:—

"La Cour ayant entendu les parties par leurs procureurs respectifs sur le mérite de l'opposition afin d'annuler du dit demandeur opposant et de la contestation d'icelle, etc;

"Attendu que le dit défendeur saisissant a pendant l'instance, produit un désistement quant à la somme de $96.52, montant de ses frais taxés en Cour Supérieure, limitant la saisie par lui pratiquée en cette cause à la somme de $242.41, montant de ses frais taxés en Cour d'Appel;

"Considérant que lors de l'émission du bref d'exécution *de bonis et de terris* dont l'opposant demande l'annulation, savoir, le 16 mai 1888, le jugement de la Cour du Banc de la Reine siégeant en Appel, prononcé le 22 février

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1887, n'avait pas encore été enregistré au greffe de la présente Cour Supérieure, siégeant à Ste-Scholastique, et que même aucune copie dûment certifiée n'en avait été déposée au greffe susdit, mais qu'il appert que le dit jugement n'a été déposé et enregistré au dit greffe que dans le mois de septembre 1888, savoir, environ quatre mois après l'émission du dit bref d'exécution et deux mois après la production de l'opposition du demandeur, ainsi que le tout est constaté par le certificat et par le témoignage du protonotaire de cette Cour ;

"Considérant que le document produit à l'enquête par le défendeur contestant comme son exhibit "Y," étant copie d'un prétendu reçu en date du 26 juillet 1887, par lequel il apparaîtrait qu'un certain Alphonse Raby, député-protonotaire de cette Cour, aurait à la dite date reçu du greffier des appels le dossier de la présente cause ainsi qu'une copie certifiée du jugement en appel, n'est pas un document authentique et qui pourrait être certifié comme tel par le greffier des appels ; que l'original du dit reçu n'a pas été produit, et qu'aucune preuve n'a été faite à l'appui du dit document qui n'a pas lui-même aucune force probante et qui ne saurait prévaloir contre le certificat officiel et contre le témoignage du protonotaire de cette Cour ;

"Considérant d'ailleurs que le fait que le dit A. Raby aurait reçu la dite copie de jugement à la date que comporte le dit prétendu reçu n'est pas conclusif dans l'espèce, attendu que le dit A. Raby peut avoir reçu la dite copie sans en faire le dépôt et l'enregistrement au greffe de cette Cour, et que seuls ce dépôt et cet enregistrement pouvaient également constater que le dit jugement avait été dûment reçu par la Cour de première instance chargée par la loi (Art. 1176, C. P.) de le faire exécuter ;

"Considérant que la dite Cour de première instance ne pouvait procéder à l'exécution du dit jugement avant le dépôt et l'enregistrement régulier d'icelle au greffe de la dite Cour ;

"Considérant de plus qu'il n'appert pas que le mémoire de frais en appel du dit défendeur contestant, et

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que ce dernier veut prélever au moyen de l'exécution qu'il pratique, ait jamais été taxé contradictoirement avec le dit opposant ; qu'au contraire, il appert seulement que le dit opposant avait reçu avis de taxation pour le 14 juillet 1887, et que le dit mémoire n'a été taxé que le 25 juillet 1887, sans qu'il soit constaté à quelle date il a été présenté pour taxation au greffier des appels ;

"Considérant que la date de l'oblitération du timbre judiciaire, dont le dit mémoire est revêtu, et la date même de la dite taxation ainsi que les termes d'icelle (qui n'énoncent pas que l'opposant a été entendu ni que le dit mémoire a été présenté le 14 juillet suivant l'avis donné à l'opposant) démontre *prima facie* que le dit mémoire n'a été présenté pour taxation que le 25 juillet 1887, sans avis à la partie adverse et sans ajournement antérieur ;

"Considérant que pour ces deux raisons le dit bref d'exécution *de bonis et de terris* a été émis illégalement, irrégulièrement, prématurément et sans droit par le protonotaire de cette Cour, à la demande du défendeur saisissant, et que l'opposition du demandeur opposant invoquant ces moyens de nullité est bien fondée ;

"Considérant qu'il devient inutile d'entrer dans l'examen des autres moyens allégués dans l'opposition ;

"Considérant que la défense en droit du défendeur saisissant à partie des allégations de l'opposant, sur laquelle défense en droit, la Cour, par son jugement du 19 mars dernier, a ordonné preuve avant faire droit, frais réservés, était bien fondée pour partie, savoir, quant au moyen énonçant en réponse à la prétention contraire de l'opposant, que le créancier saisissant peut toujours pratiquer en son propre nom une saisie pour les frais auxquels la partie adverse a été condamnée, même lorsque ces frais ont été distraits en faveur des procureurs du saisissant, mais considérant que la dite défense en droit était mal fondée quant au second moyen y invoqué, savoir, celui reprochant à l'opposant d'alléguer surcharge dans un mémoire de frais dûment taxé, attendu que le dit opposant niant dans son opposition la taxation régu-

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lière du dit mémoire, pouvait en loi alléguer la surcharge et l'exagération d'icelui ;

"Maintient le premier moyen de la dite défense en droit du défendeur contestant, rejette comme illégales toutes les allégations de l'opposition ayant trait à la distraction de frais, obtenue par M. Palliser, procureur du défendeur, et la compensation que l'opposant prétend pouvoir opposer à ce dernier, et rejette la dite défense en droit quant au surplus, sans frais, rejette au mérite la contestation du défendeur saisissant, maintient pour les raisons déjà déduites, l'opposition afin d'annuler du dit demandeur opposant, déclare illégale l'émission du dit bref d'exécution *de bonis et de terris*, annule la saisie pratiquée en vertu du dit bref et en donne main levée à l'opposant, avec dépens contre le dit défendeur saisissant."

Sept. 25, 1890.]

Palliser, and *Trenholme*, *Q.C.*, for the appellant :—

By the judgment appealed from appellant's demurrer as to compensation is maintained, and all the allegations having reference to it are rejected and struck from the opposition, but the opposition itself is maintained and the execution held to have been illegally and prematurely issued, (1) because as alleged no judgment in Appeal of the 22nd of February, 1887, was received or registered in the Court below until after the issue of the execution, and (2) because the bill of costs in appeal had been taxed without notice.

As to the first point, a copy of the judgment in Appeal had been deposited with the prothonotary nearly ten months previous to the issue of the writ of execution. The one fact for the Court below to find should have been, was such a judgment rendered more than fifteen days previous to the issue of the execution ? Admitting that a copy of such judgment should be in the hands of the prothonotary to justify the issue of the execution, the question, if received, whether it was enregistered or not is clearly immaterial and irrelevant.

On the second point—that the bill of costs in appeal was taxed without notice to respondent—there is no proof

of the fact alleged. Notice was given for 14th July, and the presumption is that the bill was taxed regularly by the clerk of the Court.

The respondent, in person, in reply.

Nov. 27, 1890.]

Bossé, J. :—

The Court is of opinion that the judgment must be reformed. The judgments of this Court are registered here, and are executory without registration at the office of the prothonotary of the Court below. As to the other point, the alleged taxation of the costs in appeal without notice, we have the certificate of the clerk of the Court that the costs were taxed on the 25th. The taxation is regular on its face. If Mr. Burroughs' statement is correct, why did he not prove it by producing the clerk? We cannot in the face of the certificate declare the taxation irregular.

The judgment in appeal is as follows :—

"Vu le retraxit produit en Cour Supérieure par le demandeur saisissant, par lequel il renonce à la saisie, par lui faite, pour la somme de $96.52 ;

"Considérant que les jugements de cette Cour sont exécutoires sans qu'il soit besoin de les enregistrer au greffe de la Cour dont est appel, et que lors de l'émanation du bref de *fieri facias* en question en cette cause le jugement de cette Cour y mentionné était exécutoire ;

"Considérant que la taxation des frais en appel et du montant y réclamé par le dit bref de *fieri facias*, est apparemment régulière, et que l'opposant a failli dans sa preuve, à l'encontre de la taxation du mémoire des dits frais ; que son opposition est partant mal fondée en autant qu'elle s'applique aux dits frais en appel, mais qu'elle est bien fondée quant à la dite somme de $96.52, frais encourus en Cour Supérieure mais non taxés, et pour lesquels le demandeur a produit le dit retraxit ;

"Considérant qu'il y a erreur dans le dit jugement de la Cour Supérieure siégeant à Ste-Scholastique le 14 juin 1889, dont est appel ;

"Cette Cour modifie le dit jugement, et procédant à

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rendre le jugement que la dite Cour Supérieure aurait dû rendre, maintient la dite opposition afin d'annuler quant à la dite somme de $96.52, avec dépens d'icelle opposition jusqu'à la date de la production du dit retraxit, en faveur du dit opposant, renvoie la dite opposition quant au surplus, avec dépens contre le dit opposant, à compter de la date du dit retraxit, et les dépens en appel contre l'intimé en faveur de l'appelant. (*Dissentiente* l'hon. juge Tessier)."

Judgment reversed.

J. Palliser for the appellant.

Burroughs & Burroughs for the respondent.

(J. K.)

September 27, 1887.

Coram DORION, C. J., TESSIER, CROSS, BABY, JJ.

HENRY M. GILES, ès-qual.,
(*Plaintiff in Court below*),
APPELLANT;

AND

JEROME JACQUES,
(*Defendant in Court below*),
RESPONDENT.

Quality to sue—C. C. P. 14, 19—*Receiver to foreign corporation in liquidation.*

HELD:—(Reversing the judgment of Taschereau, J., M. L. R., 1 S. C. 166), Where an action was brought in the province of Quebec, by the plaintiff as receiver to a corporation in liquidation domiciled in Ontario, and it was proved by the production of the Ontario Statute that the plaintiff, as receiver, was duly authorized to represent the corporation in judicial proceedings, he may also appear in his quality of receiver in judicial proceedings before the courts of the province of Quebec.

APPEAL from a judgment of the Superior Court, Montreal (TASCHEREAU, J.), January 17, 1885, dismissing an action brought by the appellant as receiver of the Nia-

gara District Mutual Fire Insurance Company, a foreign corporation. The judgment of the Court below is reported in M. L. R., 1 S. C. 166. See also *Giles* v. *Faneuf*, M. L. R., 1 S. C. 322.

March 24, 1887.]

Lafontaine, for appellant :—

L'intimé, sur la requête des créanciers, a été nommé, par la Cour de Chancellerie d'Ontario, *receveur* de la compagnie d'assurance mutuelle dite "The Niagara District Mutual Fire Insurance Company," établie à Ste-Catherine, dans la province d'Ontario, en 1836.

En 1875, cette compagnie étendit ses opérations à notre province et établit une agence à Montréal. A cette époque ces compagnies jouissaient d'une grande faveur auprès du public, qui se voyait avec plaisir à la fois assuré et actionnaire. Mais vinrent les calamités, les incendies de Québec, Saint-Jean, Saint-Hyacinthe et la Pointe-Lévis, pour ne mentionner que les plus importants dans cette province. Avec ces malheurs publics les répartitions arrivèrent plus fréquentes et plus élevées.

On se crut volé lorsqu'on avait été que mauvais calculateur. Bref les membres refusèrent en masse de payer leurs contributions. De là la gêne dans les affaires de la compagnie, et l'alarme chez les créanciers qui devenaient plus pressants.

Ce fut dans ces circonstances que le demandeur fut nommé receveur de la Compagnie d'Assurance Mutuelle la "Niagara," dont le défendeur est membre.

L'action a pour but de recouvrer du défendeur le montant de la répartition imposée le 13 juillet 1877 par les directeurs, pour rencontrer les pertes et les dépenses de la compagnie.

Il va sans dire que la loi qui doit déterminer le litige entre les parties, n'est pas la loi de la province de Québec, mais celle de la province d'Ontario, où la compagnie a son domicile, et suivant laquelle elle a été organisée et est actuellement régie. — Voir Thompson's Liability of Stockholders. § 80.

Cette loi est le statut 36 Vict., c. 44, et suivant le statut

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31 Vict., c. 18, se trouve dans la copie des statuts imprimés par l'Imprimeur de la Reine pour cette année, produite au dossier.

Cette loi contient assez peu de différence d'avec la nôtre, au moins quant aux questions soulevées dans ce litige. Remarquons seulement que les sections 74 et 75 règlent les pouvoirs et fonctions du receveur, qui est inconnu à notre système, que par la section 43 il est permis aux directeurs de prélever des versements quand ils le jugent à propos, et que la compagnie n'est pas astreinte à l'obligation de tenir un livre de répartition pour chaque feu comme le veut notre loi par le paragraphe 2e de la section 21 du chapitre 68 des Statuts Refondus du Bas-Canada.

Cependant une différence caractéristique se trouve dans la *preuve* de la réclamation. La section 48 prescrit que le certificat du secrétaire-trésorier est une preuve *primâ facie*. Ce certificat est produit dans cette cause. Nous soumettons que cette section, comme tout le reste de la loi, s'applique aux poursuites en cette province. Car les auteurs sont d'accord que la preuve du contrat se fait selon la loi du pays où il a été effectué—Laurent, Droit International Privé, 8e vol., Nos. 22 à 25. Or le lieu du contrat dans les contrats par correspondance, comme a été effectué le contrat en question ici, c'est le lieu où l'offre est reçue et d'où part l'acceptation.—Wharton, Private International Law, No. 427.

La preuve démontre que le montant, que l'appelant espère pouvoir collecter, sera certainement *au-dessous* de la somme requise, pour couvrir les dettes de la compagnie, dont l'intimé est responsable. Ces dettes s'élèvent à $154,-986. Il est à remarquer que toutes ces dettes ont été encourues depuis l'entrée de l'intimé dans la compagnie.

Or, pour faire face à cette réclamation, d'autant plus pressante qu'elle représente une somme de malheurs considérables, la compagnie avait en mains des billets de dépôt imposables au montant de $160,000, laissant un surplus d'à peine $5,000, somme tout-à-fait insuffisante pour couvrir les frais de la collection contre des débiteurs

récalcitrants, encouragés par des succès partiels dans des procès engagés avec d'autres compagnies, ou pour rencontrer les pertes inévitables par suite de l'insolvabilité d'un certain nombre. Car la preuve constate que le minimum à fixer pour ces deux éventualités est d'au moins trente-trois pour cent, ce qui réduirait l'actif de la compagnie à $106,667 pour faire face à un passif de $154,986.

Aussi la compagnie a demandé le paiement de la balance de tous les billets de dépôt. L'appel fait et réclamé est donc légitime, il est justifié amplement, il était nécessaire. Désireux d'en assurer le paiement, à leur profit, les créanciers ont fait nommer un receveur chargé de réaliser et percevoir, et qui est le demandeur en cette cause.

Ayant établi la position de la demande, voyons maintenant les moyens de la défense, qui se réduisent à quatre principaux points:

1o. Le défaut de qualité du demandeur pour intenter la présente action.

2o. L'inexistence d'un contrat d'assurance entre les parties.

3o. La fraude, fausses représentations, insolvabilité, etc.

4o. La prescription de cinq ans.

Nous mettons de côté le moyen banal de fraude, fausses représentations et insolvabilité, comme n'étant supporté d'aucune preuve, et le plaidoyer de prescription comme n'étant pas soutenable en face des autorités suivantes:

2 Alauzet, p. 514, No. 585.—32, Laurent, No. 470, p. 495. —1843, Sirey, 1er p., p. 204.—1856, Sirey, 1er p., p. 514. —M. C. R. p. 68.

Le demandeur a-t-il qualité pour intenter l'action?

Pour résoudre cette question il importe de mettre en lumière deux points: 1o. que le droit d'action n'est pas une formalité de justice, mais appartient au statut personnel; 2o. que le demandeur n'est pas l'agent, comme on l'appelle, ou le mandataire de la compagnie *La Niagara*, mais un officier de justice, comme un tuteur, un curateur, un syndic, un séquestre ou un gardien.

1o. Que le droit d'action ne soit pas une simple forma-

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lité de justice—régie par le statut du lieu où l'action est intentée—cela saute aux yeux. Il ne s'agit pas des règles de la procédure ou du tribunal devant lequel l'action est instituée, mais uniquement *de la capacité* de la personne, pour intenter une action. Ce droit rentre donc à ce titre dans le statut personnel, comme tout ce qui touche à la capacité de la personne.—Fœlix, vol. 1er, p. 85, idem, vol. 2e, p. 201.

Pour déterminer si le demandeur a la capacité d'ester en justice, nous examinerons donc si, d'après la loi d'Ontario, c'est-à-dire la loi du domicile de la compagnie, le demandeur a cette capacité. En effet, deux textes positifs de notre loi veulent que ce soit cette loi qui en décide: le paragraphe 4 de l'article 6 du Code Civil, qui dit que l'individu résidant dans le Bas-Canada, mais qui n'y est pas domicilié, "reste soumis à la loi de son pays quant à son état et sa capacité," et l'article 14 du Code de Procédure qui règle que, "toute corporation ou personne dûment "autorisée à l'étranger à ester en jugement, peut exercer "cette faculté devant tout tribunal du Bas-Canada."

Or, ce droit d'action du demandeur dérive de la nature de ses fonctions, de ses pouvoirs spéciaux et de la loi.

En effet le demandeur est chargé de la réalisation des biens de la compagnie et de la perception des créances, il en est l'ayant cause et le représentant, il est nanti de ses biens, porteur de ses titres, créances, livres, enfin détenteur de son actif, il reçoit, transige et donne quittance—voir la section 74 du chap. 44 du statut produit.

Or qui veut la fin veut les moyens, et si le demandeur n'avait pas le droit de poursuivre les débiteurs récalcitrants, le but de sa nomination serait complètement frustré.

Aussi la Cour de Chancellerie, pour faciliter les opérations du demandeur, lui a expressément donné la permission d'exercer, selon sa capacité, la faculté de poursuivre en *son nom personnel* pour le recouvrement des créances de la compagnie, soit pour répartition ou autres réclamations.

Comment mettre de côté un ordre aussi explicite quand

il n'est pas attaqué par la partie adverse, lorsque notre loi l'autorise au contraire formellement par l'article 14, C. P. C., que nous avons cité plus haut ?

Comment dire que la Cour de Chancellerie a permis l'exercice d'un pouvoir que le demandeur n'a pas, quand rien ne le démontre ? "Omnia acta, dit la maxime, rite esse praesumuntur."

Enfin ce pouvoir de plaider en son nom, le demandeur le tient de la loi. Il suffirait pour établir ce point de référer à l'ordre de la Cour de Chancellerie qui vient d'être mentionné, car en l'absence de contestation cet acte du pouvoir judiciaire se justifie par lui-même, mais l'appelant va plus loin et trouve dans la section 75 du statut cité, le pouvoir explicite du demandeur de poursuivre en son nom.

En effet par cette section il est dit que le receveur exerce tous les droits et remèdes, *rights and remedies*, de la compagnie ou des directeurs au sujet des répartitions. Or l'un des remèdes inhérents à toute compagnie par le droit commun, et aux compagnies d'assurance mutuelle d'Ontario, en vertu d'un texte même, la section 47 du chap. 44 du statut produit, est celui de poursuivre les débiteurs en défaut.

D'après la loi de son domicile, le demandeur a donc droit d'action, et notre loi autorise l'exercice de ce droit.

Ainsi dans la cause *Osgood & Steele*, 16 L. C. J., p. 141, le droit d'intervention d'un receveur à une compagnie d'assurance de New-York, n'a pas été mis en doute. De même dans la cause *Fisk & Stevens*, la Cour Suprême a maintenu l'action de la femme, parce qu'elle avait le droit de poursuivre d'après la loi de l'Etat de New-York.—Voir 8 L. N., p. 51, remarques du juge Fournier.

C'est cette doctrine qu'Aubry et Rau expriment dans le vol. 1er, par. 31, p. 97, où ils disent : "Le tuteur, le curateur ou le syndic investi à l'étranger du gouvernement, de la personne ou de l'administration des biens, a qualité pour agir en France même contre des Français."

Dans le même sens, Thompson's liability of stockholders, § 81.

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L'appelant cite en sa faveur le jugement de l'hon. juge Torrance, M. L. R., 1 S. C., p. 322, *Giles* v. *Faneuf*, et celui de l'hon. juge Buchanan, 5 L. N., p. 369, *Giles* v. *Brock*.

2o. Mais en supposant que le droit d'ester en justice ne serait qu'une simple formalité réglée par la loi du lieu où l'action est intentée, est-il vrai de dire que notre loi ne permet pas l'action du demandeur de la manière dont elle est intentée?

Pour répondre affirmativement, nos adversaires sont obligés de ne considérer le demandeur que comme le mandataire de la compagnie, ou pour employer leurs expressions, "*un agent collecteur*." Cette manière de voir leur permet d'appliquer la maxime bien connue que "nul ne plaide au nom d'autrui." Art. 19, C. P. C.

C'est se tromper étrangement. Le demandeur n'est pas le mandataire de la compagnie, et la maxime invoquée n'a pas d'application ici. D'après ce que l'intimé dit des fonctions du receveur et de sa nomination, il est évident qu'il n'est pas un agent collecteur, ni le mandataire de la compagnie "*La Niagara*." Il ne tient pas ses pouvoirs de la compagnie, elle n'a aucun contrôle sur lui, il ne lui est pas libre de le révoquer; au contraire il est l'officier de la justice, loin d'obéir à la compagnie il lui commande, elle a été obligée de lui céder tout son actif et de se dépouiller entre ses mains, il agit enfin pour le bénéfice des créanciers, et pour celui de la compagnie qu'indirectement, en séquestrant son actif pour lui faire payer ses dettes. Non, le demandeur n'est pas l'agent de la compagnie, il est *lui* (*sui generis*). Or un tel personnage a-t-il dans notre droit le pouvoir de poursuivre, pour les fins de sa charge? L'appelant dit résolument: Oui, et le prouve par le raisonnement, la doctrine et la jurisprudence.

Où est le texte de la loi qui permet au tuteur, au curateur, au séquestre, au gardien même, au syndic, d'ester en justice? Cela va de soi dit-on, leurs fonctions, la nécessité de leurs charges. L'appelant répond de même. La parité est incontestable.

Mais y a-t-il un texte de loi qui défend cette manière de procéder? Les adversaires citent l'article 19. Mais

tous les auteurs répondent que cette maxime n'a pas d'application au présent cas. Nous trouvons en effet dans Laisny et Rousseau, Dictionnaire de Procédure, vo. Action, No. 103, la doctrine suivante: "Au surplus, cette "règle (que nul ne plaide au nom d'autrui,) ne s'applique "qu'au mandat conventionnel et non au mandat légal. "Ainsi elle ne s'applique ni au tuteur, ni au curateur, ni "à l'administrateur judiciaire, ni au mandataire *ad litem*, "ni à tous ceux qui peuvent se prévaloir d'une représen- "tation judiciaire."

Dans le même sens, Dalloz, vo. Action, Nos. 273 et 276.

Sur le véritable sens de cette maxime, l'intimé cite encore Carré et Chauveau, vol. 1er, p. 128 et 129.

Boistard, vol. 1er, p. 114.

Aussi Aubry et Rau, vol. 8, p. 133, disent-ils: "Les ad- "ministrateurs d'une personne morale, les tuteurs, les "syndics d'une faillite, en leur qualité de représentants, "agissent en leur nom propre.—Pigeau, vol. 1er, p. 52. Les créanciers unis plaident par leurs directeurs.

La doctrine et la jurisprudence sont allés beaucoup plus loin qu'il n'est nécessaire de le faire pour déterminer le présent litige. Le savant Juge-en-Chef dans la cause de *Burland & Moffatt*, a démontré par une longue suite d'arrêts que le *cessionnaire fidei-commissaire*, pouvait poursuivre en son nom propre, pour le bénéfice du cédant ou des créanciers.

Enfin même si le demandeur n'était qu'un mandataire *découvrant* dans son action, *son principal* comme il le fait, son action eut dû être maintenue—Carré et Chauveau, vol. 1er, p. 290, et les auteurs cités.

En sorte que d'après notre loi, comme d'après le statut personnel, le demandeur a droit de poursuivre en son nom personnel.

Pagnuelo, Q.C., for the respondent:—

Le demandeur était-il autorisé à prendre cette action; s'il l'était, pouvait-il la prendre autrement qu'au nom de la compagnie?

D'après le Statut d'Ontario de 1873, 36 Vic., ch. 44, sec. 75, c'est la Cour de Chancellerie qui nomme le receveur,

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définit ses pouvoirs, et peut lui donner le droit de poursuivre.

Si l'on réfère en outre au décret de la même Cour du 26 juin 1877, qui a ordonné la liquidation et la nomination d'un *receiver*, on voit que la Cour définit exactement tous les pouvoirs qu'elle lui accorde, et que le receveur n'est qu'un commis, un agent qui n'est pas saisi des biens de la compagnie, autrement que comme un simple commis. Ce qui le démontre abondamment c'est que, d'après le témoignage du demandeur, les directeurs sont restés en exercice. Ce sont eux qui auraient fait la prétendue répartition du 13 juillet 1877 ; et lui-même continue d'agir comme secrétaire, et de donner des certificats en cette qualité.

Un second décret est produit : c'est celui du 15 février 1878 ; mais il est donné en chambre par un *referee*, on ne sait où ; rien même n'indique que ce soit dans la province d'Ontario. Cet ordre prétend donner au *receiver* le droit de poursuivre soit au nom de la compagnie, soit en son propre nom.

Mais il faut remarquer, 1o. que la Cour de Chancellerie elle-même ne pouvait, d'après le Statut de 1873, que donner la permission de poursuivre ; c'est la loi ensuite qui règle au nom de qui la poursuite doit être intentée, et il n'a pas été prouvé que la loi d'Ontario permette au *receiver* de poursuivre en cette qualité ; 2o. cet ordre n'est pas donné par la Cour de Chancellerie d'Ontario, mais en chambre par le *referee* d'une Cour de Chancellerie d'un pays inconnu. Qu'est-ce que le *referee?* Est-ce un officier répondant au protonotaire, ou à un auditeur ? On l'ignore.

En droit français on ne plaide pas par procureur. Les actions du demandeur ont déjà été déboutées sur ce principe, par les honorables juges Taschereau, Chagnon, Cimon et Loranger.

Giles v. *Jacques*, M. L. R., 1 S. C. 166 ; *Giles* v. *Giroux*, 13 R. L., 652, Loranger, J. ; *Giles* v. *Garièpy*, 29 J., 207, Cimon, J. ; *Giles* v. *Hébert*, à St-Jean, Chagnon, J.

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CROSS, J. :—

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Giles was appointed receiver by the Court of Chancery of Ontario, to an insolvent insurance company, and the present action is brought by him, as receiver, to recover calls or assessments. One of the difficulties is got over by the production of the Statute of Ontario, which gives jurisdiction to the Court of Chancery to put the company in liquidation, and authorizes the receiver to exercise the rights and remedies of the company. The objection that the assessment was made after the liquidation is not sound. There was nothing to prevent the necessary acts being done afterwards. The directors had a duty to perform which could not be performed by any one else until the liquidator was appointed. Moreover, the liquidator when he came into office approved of it. We think that the action of Giles should have been maintained. The judgment will therefore be reversed.

DORION, C. J. :—

In this case and in that of *Primeau & Giles* (*post*), the actions were brought by Giles as receiver to the Niagara Mutual District Insurance Company. In the case of *Primeau & Giles*, Primeau, the defendant, was condemned. In the case of *Giles & Jacques*, Jacques, the defendant, was exonerated. There is very little difference between the two cases, except that in the case of Jacques the Ontario Statute was filed, while in the case of Primeau it was not filed. We think in the former case the action should have been maintained, while in the Primeau case it should have been dismissed. As to the question of calls, they were made by the directors after the Court of Chancery had ordered that a receiver be appointed, but before he was actually appointed. According to our law the moment a company is insolvent the power of the directors ceases. Foreign law is presumed to be the same as ours where the contrary is not proved. Therefore on the 13th July, 1877, when these calls were made, the directors according to our law would have had no authority to make them. In the Jacques case the Ontario Statute is produced, and shows that the proceedings are regular. It may be

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said, you have the statute before you in the case of Jacques, why not put it in force in the case of Primeau? The answer is that we can only look at it in the particular case in which it is produced. Where the foreign law is not proved we have to take it for granted that it is the same as our own.

The other grounds urged by the respondent are not tenable. As to prescription, these notes are not prescribed like other notes. It is further said that when Jacques was insured he obtained a receipt which stated that if within thirty days the policy of insurance was not transmitted to him the insurance should be null. I suppose this is a clause inserted in receipts by companies to guard against the dishonesty of their agents. I don't think there is anything in that objection.

The judgment of the Court is as follows :—

" Considérant que l'appelant a prouvé que les directeurs de la compagnie qu'il représente avaient le droit de déclarer, comme ils l'ont fait, que des versements seraient payables par les assurés sur les prix de prime pour lesquels la présente action a été portée ;

" Et considérant que l'intimé n'a pas prouvé les allégations de ses exceptions péremptoires ;

" Cette Cour, considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure siégeant à Montréal le 17e jour de janvier 1885 ; casse et annule le dit jugement, et rendant le jugement que la dite Cour de première instance aurait dû rendre, condamne l'intimé à payer à l'appelant la somme de $139.50, avec intérêt, et les dépens encourus tant en Cour de première instance que sur l'appel. (*Dissentiente* l'hon. M. le juge Tessier."

Judgment reversed.

Préfontaine & Lafontaine for appellant.

Pagnuelo, Taillon & Gouin for respondent.

(J. K.)

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The judgment in the case of *Primeau & Giles*, which was rendered at the same time, reads as follows :—

"Considérant que l'intimé n'a pas prouvé que par la loi de la province d'Ontario les versements qu'il réclame par son action ont été régulièrement demandés, et que les directeurs de la compagnie que l'intimé représente avaient, à l'époque où ils ont fait cette demande, le droit de la faire ;

"Et considérant que d'après la loi en force en cette province les directeurs de la compagnie que l'intimé représente, n'auraient pas eu le droit de régler et d'ordonner le paiement par les assurés des versements sur leurs billets de prime après qu'il eût été déclaré par la Cour que la société était insolvable, et que ses affaires devaient être liquidées sous l'autorité du Statut réglant le mode de liquider les affaires d'une société devenue insolvable ;

"Et considérant que l'intimé n'a pas prouvé la loi de la province d'Ontario à cet égard, ni en quoi elle diffère de la loi de la province de Québec ;

"Et considérant qu'en l'absence de telle preuve, la loi de la province d'Ontario doit être considérée comme étant identique avec celle de la province de Québec, et qu'il résulte de cette circonstance que les directeurs de la compagnie que l'intimé représente n'avaient pas le droit de déclarer quels versements les assurés seraient assujettis à payer ;

"Et considérant qu'il y a erreur dans le jugement rendu par la Cour de première instance, savoir, la Cour Supérieure siégeant à Beauharnois le 5e jour de janvier 1886 ;

"Cette Cour casse et annule le dit jugement du 5 janvier 1886, et renvoie l'action de l'intimé avec dépens. (*Dissentiente* l'hon. M. le juge Cross)."

September 24, 1887.

Coram DORION, C.J., TESSIER, CROSS, CHURCH, JJ.

CITÉ DE MONTRÉAL,
(*Defendant in Court below*),
APPELLANT;

AND

ZÉPHIRE LABELLE ET AL.,
(*Plaintiffs in Court below*),
RESPONDENTS.

Corporation—Negligence—Damages—Solatium.

HELD:—(Affirming the judgment of Papineau, J., M. L. R., 2 S. C. 56), That the children of a person killed by an accident caused by the bad condition of a public street, are entitled, without proof of special damage, to damages by way of *solatium* for the loss of a parent. Cross, J., dissenting.

[But this decision was reversed by the Supreme Court of Canada, and the action dismissed. See 14 Can. S. C. R. 741.]

R. Roy, Q.C., for appellants.
C. H. Stephens for respondent.

(J. K.)

March 26, 1887.

Coram DORION, C.J., TESSIER, CROSS, BABY, CHURCH, JJ.

REGINA v. BOWEN ALIAS COLE.

Forgery—Order for the payment of money.

The prisoner was convicted of forging an order for the payment of money. It appeared that he had forged an order purporting to be signed by a foreman, addressed to his employers, requesting them to pay the person therein named or order, a specified sum. This was the mode adopted by the foreman of certifying to his employers that so much was due for wages to the persons named in the orders.

HELD:—That the instrument in question was an order for the payment of money, and that the conviction should be affirmed.

CASE RESERVED by WURTELE, J., Court of Queen's Bench, Crown side, District of Ottawa, December term, 1886 :—

"The prisoner George Bowen *alias* Irwin Cole was tried and convicted before me in the Court of Queen's Bench in the exercise of its criminal jurisdiction in the district of Ottawa, on the 14th December, 1886, upon an indictment charging him in one count with forging an order for the payment of money, and in another count with uttering such order.

"The instrument in question reads as follows :—

'Getewawa Limit.

'Madawaska Depot, 27th Oct. 1886.

'Mr. Perley & Pattee.

'Please pay to George Bowen or order the sum of fifteen dollars.

'W. H. MOOR.
'pr. F. W. B.'

"The evidence was clear of the prisoner having forged and uttered the instrument.

"But it was also proved that Mr. Moore, the drawer, was the agent of the firm of Perley & Pattee at their limit; that it was the custom, on settling with the men employed by the firm on the limit, for Mr. Moore, acting either himself or by the clerk F. W. Brooks, to give them orders on the firm, similar to the instrument in question, for the amounts due to them respectively, and that such orders were paid at the head office in Ottawa, less however any payments previously made there. Mr. Brooks furthermore stated that these instruments were certificates of the amounts due by the firm to the payees, and that if the firm refused payment of any of them it would not involve him in any responsibility.

"The counsel for the prisoner submitted that there was no case to go to the jury, and contended inasmuch as the instrument charged as forged would not, if authentic, have bound compulsorily either the firm of Perley & Pattee to whom it was addressed, or the party signing

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it, and inasmuch as, by the evidence, it was a certificate by a foreman that so much was due to a certain party for wages, or at most a request to pay, that a conviction of having forged and uttered an order for the payment of money could not be had.

"I was of opinion that the drawer, under the circumstances proved, would be liable to an indorsee who in good faith acquired and held a genuine instrument similar in form to the instrument charged to have been forged, and that such instrument was an order for the payment of money, and was properly described as such in the indictment. I therefore overruled the objection and ordered the case to go to the jury.

"But as it was contended that there were serious doubts whether the instrument in question was an order for the payment of money, I postponed judgment until the question is decided, and I reserved the case for the opinion of the Court of Queen's Bench sitting in appeal as a Court for the consideration of Crown Cases Reserved; and the question is: Whether the prisoner was properly convicted for forging and uttering an order for the payment of money.

DORION, C.J., said the Court was clearly of opinion that the instrument in question was an order for the payment of money. There was nothing in the objection urged on behalf of the prisoner.

Judgment:

"It is considered and adjudged..... that in the opinion of this Court the proceedings had and taken in the said Court at Aylmer are regular, that the ruling of the judge presiding in the said Court of Queen's Bench is correct, and that no reason hath been assigned by and on behalf of the said Edward Cole or Bowen sufficient to set aside the conviction in the indictment in this cause."

Conviction affirmed.

J. N. Greenshields for the Crown.

(J. K.)

November 27, 1889.

Coram DORION, C. J., TESSIER, CROSS, CHURCH, BOSSÉ, JJ.

THE MAIL PRINTING COMPANY,
(*Defendant in Court below*),
APPELLANT;

AND

LA COMPAGNIE DE JÉSUS,
(*Plaintiff in Court below*),
RESPONDENT;

AND

HON. A. TURCOTTE, Atty. Gen.,
INTERVENANT.

Procedure—Exception to the form—Motion to strike out allegations—Art. 135, *C.C.P.*

HELD:—1. That vague and indefinite allegations in an exception to the form may be rejected on motion of the adverse party.

2. The allegations of a pleading must be sufficiently clear and distinct to enable the opposite party to reply thereto. So, where the defendants by an exception to the form alleged that the Act incorporating the plaintiff, *La Compagnie de Jésus*, was *ultra vires*, because the persons incorporated were incapable of exercising any civil rights in the province by reason of the vows which they had taken—without specifying the vows—and because the object of their society was the promulgation of doctrines contrary to Imperial Statutes, set forth in certain works filed as exhibits—without specifying the doctrines objected to,—these and other like allegations were rejected as vague and lacking precision.

APPEAL from a judgment of the Superior Court, Montreal (LORANGER, J.), May 14, 1889, granting in part a motion to strike out allegations from an exception to the form filed by the appellants. The judgment of the Court below is reported in M. L. R., 5 S.C. 306.

R. Laflamme, Q.C, and *R. C. Smith* for appellants:—

On the 6th May, 1889, the plaintiff presented a motion that allegations 4, 5, 6, 10, 11 and 13 of the exceptions to

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the form, together with the exhibits produced in support of the latter allegation, should be struck out and rejected from the record as informal, irregular, vague, indeterminate and not sufficiently *libellées*. The judgment rendered on the 14th May granted this motion and struck out the allegations objected to, with the exception of the opening sentences of allegations four and six, which were allowed to remain. It was from this interlocutory judgment that defendant obtained leave to appeal on the 18th of May.

The appellant first takes exception to the procedure adopted by the plaintiff, and objects to have its plea disposed of so summarily upon a mere motion. That a declaration is not sufficiently libelled should be pleaded by exception to the form. Article 138 of the Code of Procedure, clearly implies that similar defects in pleadings other than declarations are to be attacked in the same manner. Respondent should, if it found the exception to the form insufficiently libelled, have answered it by an answer in the nature of an exception to the form under Article 138. In that case appellant would have had the benefit of a regular joinder of issue as provided in articles 107 to 110 of the Code of Procedure. But respondent relies upon Article 135, which says: "Grounds of pre-"liminary exception may in certain cases be urged by "motion according to the practice of the courts." The terms of this article make it clear that grounds of preliminary exception cannot in all cases be urged by motion, but only "in certain cases, according to the practice of the courts." This evidently refers to motions which are treated as of course, such as obtaining security for costs and a power of attorney from a non-resident plaintiff by means of a motion more promptly than by a dilatory exception. There is no law nor practice of our courts to justify the elimination of so important a portion of a plea as has been struck out in this case in the summary manner complained of in this appeal.

Even, however, if the Court were disposed to accord to plaintiff the right to proceed by motion, appellant sub-

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mits that upon the merits the judgment is clearly erroneous. This court has laid down the rule that the merits of a plea cannot be tested upon a motion to reject it (*Low* v. *Montreal Telegraph Co.*, 4 L. N. 381), and in the Superior Court the doctrine and practice are well established. The only question presenting itself is whether this exception to the form is sufficiently libelled. This is all that is raised by the motion, and appellant therefore argues that the question is not whether the allegations of the exception be sound or unsound as propositions of law, but merely whether they be stated with sufficient clearness to enable the plaintiff to answer them.

The first allegation objected to is numbered 4, and reads as follows:

"Because all the members of the said Society, whom "the said Act (to wit, the Society's Act of incorporation) "purports to erect into a corporation, are by the laws of "the British Empire in force in this Province, absolutely "without civil rights, *and by the solemn vows which they "have taken as such, including a vow of unconditional, absolute "and passive obedience to the General or Superior of their order "or Society, and by the rules and regulations of their Society "they are incapable of exercising any civil rights in this Pro-"vince, or of performing any of the necessary functions of mem-"bers of an aggregate corporation such as the said act purports "to create*, and the said Legislature is incompetent to con-"stitute them a corporation or declare them a corporate "body in this Province."

The portion in italics is what has been struck out by the judgment. Now whether this allegation be correct in law or incorrect, what is intended to be pleaded is perfectly evident; viz: that the members of the Society are civilly dead under the general laws of the country and by virtue of their vows and the rules of their order, that a corporation cannot be composed wholly of persons civilly dead, and that it was beyond the powers of the legislature to create such. Surely the terms of the allegation are sufficiently perspicuous. The objection of plaintiff as stated at the bar in the Court below, was

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simply that the vows and the rules and regulations of the Society were not sufficiently indicated. The pages and numbers of the vows, and rules, if indeed they have any numbers or pages, are not stated, but the vows and rules are precisely indicated, and their import is given in terms that are anything but ambiguous or equivocal. The plaintiff at the argument said, "We have rules and "regulations requiring us to retire at eight o'clock in "the evening and to rise at four o'clock in the morn-"ing, and regulating our lives in every detail. How are "we to know which rules you mean?" Such reasoning has little force. Were they, or were they not in a position to answer this allegation? They know whether they have taken "a vow of unconditional, absolute and passive obedience to the General or Superior of their order. If they have not they can answer in fact, "we never took such a vow;" or if they have, they may answer in law, "the legal effect of such a vow is not what you allege, and it does not in any way entail loss of civil rights," but they were undoubtedly in a position to answer. At the argument in the Court below counsel for plaintiff abandoned their prayer to strike out the first part of allegations four and six, admitting that they were presumed to know the laws of the land, and the court reserved these parts. Is there not at least an equal presumption that they know their own rules and regulations?

The same reasoning applies to allegations 5, 6, 10 and 11. When in allegation 5 it is stated that the Society has rules preventing its members from holding property, surely it is specific enough to prevent its being confounded with the rules regulating the hours of going to bed at night and getting up in the morning. In allegation 6 it is stated that the Society or Company respondent has rules requiring from all its members primary allegiance and obedience to a foreign power, to wit, the General of their order and the Pope. Surely the meaning of this is clear whatever the legal effect may be. So the intent of allegation 10 cannot be mistaken. It reads as follows:

"Because the objects of the said Society are not provin-

"cial, but extend beyond the province of Quebec, and "even beyond the Dominion of Canada and the British "Empire, into every quarter of the globe, and the said "Society, by its constitution and the rules which govern "its very existence, has a solidarity among its members "throughout the world and an indivisibility which pre- "vent its being in any sense 'provincial' within the mean- "ing of the British North America Act. And the said Society "and every member thereof, by solemn vows and obliga- "tions, and all that it or they can possess, are uncondi- "tionally subject to a head or general, who is an alien "and not resident within this Province or the British "Empire, and who under the rules and regulations of "said Society, could not become a British subject or con- "form himself to the laws of the Empire in force in this "Province."

Adhering to the position above assumed, that we have not to consider the merits of this proposition, but merely whether it be stated with sufficient distinctness to enable the plaintiff to answer it, appellant submits that it is not open to any objection whatever. Whether or not the solidarity and indivisibility alleged be such as to prevent the Society's objects from being provincial within the meaning of the British North America Act, is a matter that should come up for decision, after the evidence on the point is put in and its effect considered, but the question is fairly and definitely raised in this allegation. It is plainly stated that by its constitution and rules there is an absolute solidarity and indivisibility among the members of the Society, which would prevent a section or portion of it from valid incorporation as a provincial company; that this is sufficient in itself to prevent its being in any sense "provincial," and that this is emphasized by the relation of absolute subjection of all its members by solemn vows and obligations to a head or General, who is an alien; who in fact would be alone vested with corporate powers intended by the legislature to be granted to the corporators alone as citizens of the province, and subject to our laws, and that according to the fact alleged

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in the exception the legislature was deceived and ignored the fact that the so called incorporators were not the parties intended to be incorporated, but the General of the order, a foreigner having absolute power over the property and persons of the corporators, and not amenable to our laws. Whether such a Society as this is thus alleged to be comes within the meaning of the British North America Act, when it speaks of companies with provincial objects, is a question which is as definitely proposed in this allegation as it could be in any language.

The volumes produced were merely filed as a statement of doctrines. The plaintiff might have answered the allegation respecting them by repudiating them as authoritative, or authentic, by denying the effect imputed to them, or by averring that the legislature had nothing to do with the teaching of bodies it gave corporate existence to, but the purport of the allegation could certainly be understood. However, whatever can be said against this last allegation and the exhibits in support of it, appellant respectfully contends that the other allegations struck out are open to no objection whatever on the ground of vagueness, and that even if the question could be tried by motion, the judgment is erroneous, and should be reversed.

Geoffrion, Q.C., for the respondents, observed, as to the question of procedure, that it had been the practice to allow certain grounds of preliminary exception to be raised by motion. The plaintiffs complained of the vagueness of certain allegations of an exception to the form. It was preferable to raise a question like this by motion, rather than file an exception to the exception. Art. 135 of the Code seemed to sanction this practice. On the merits, he contended that it was not fair to say that the Act incorporated all the members of the Society of Jesus all over the world, with all their rules and regulations. The French version said "La Compagnie de Jésus," which did not include all the members of the society. The defendants spoke generally of the vows and rules and regulations, but the plaintiffs were entitled to know which

vows and which rules were referred to. It was impossible for the plaintiffs to answer in law and in fact where the allegations contained nothing precise.

Curran, Q.C., followed for the respondents, and in his argument raised a new objection, viz., that the legal existence of a corporation duly incorporated by an Act of the Legislature, could not be attacked or questioned by an incidental proceeding such as a plea or an exception to the form. The statute, C.S.L.C., chap. 88, sec. 9, had provided the only remedy for the case of an association acting as a corporation without any right so to do: "Whenever any association or number of persons act within "Lower Canada as a corporation, without having been "legally incorporated, it shall be the duty of Her Majesty's "Attorney General for Lower Canada, &c., to apply by "an information or petition, *requête libellée*, complaining "of such contravention of the law." This was the only proceeding which could have any value in a case of this kind. The application to reinstate the allegations which had been struck out, and which denied the legal existence of the corporation, could not therefore be entertained. This point had been decided in the case of *Union Building Society* v. *Russell*, 8 L.C.R., p. 276, in which it was held that the legal existence of a corporation cannot be questioned by an incidental proceeding, such as a plea in a cause, but must be attacked by means of proceedings under the statute cited above. This statute was embodied in Art. 997 of the Code of Procedure. The learned counsel also referred to 2 Q.L.R., p. 258, *Parent* v. *Corporation de St. Sauveur*, a decision by Chief Justice Meredith.

The CHIEF JUSTICE remarked that the law provided a mode in which illegal corporations might be attacked, but he did not think this prevented a person who was sued from pleading, "you are not a legal corporation," just as a person who was sued by a minor had a right to plead that the plaintiff was a minor.

Béique, Q.C., followed on behalf of the Attorney General, supporting the contention of Mr. Curran.

Trenholme, in reply on behalf of the appellants:—The point

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now raised by Mr. Curran for the first time, he submitted, did not present itself upon a motion to strike out certain allegations. But to show that the mode mentioned by Mr. Curran was not the only mode in which an Act could be attacked, he referred to sec. 5856 of the Revised Statutes of Quebec, requiring notice of questions as to the constitutionality of statutes raised before the courts, to be given to the attorney-general.

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CROSS, J., (*diss.*), did not think that all the allegations of the defendant's pleas should have been allowed to stand, but he would have been disposed to discriminate and allow part of the rejected allegations to stand. The incorporation of the Company of Jesus was somewhat different from any precedent that His Honor was acquainted with. It was an incorporation of the reverend fathers of Jesus, and the statute made no one responsible for the organization. It was pretended that they are a very extensive body; that they are a foreign body, not coming within the jurisdiction of the local parliament here. The allegations seemed to show that the Jesuits are a body who cannot take the oath of the Statute of Elizabeth. If, as was pretended by the appellants, they are absolutely excluded from political existence by the laws of the Empire, then the logical sequence would be that they could not have an incorporation by the Legislature of Quebec. Of course, the Jesuits could not exist in England; for there is a statute expressly declaring that the Jesuits cannot have any standing. His Honor did not see why the parties should not be entitled to raise the question whether this body was incorporated for provincial objects. Had their incorporation been expressly limited to existence in Canada, then the door might have been closed in respect of anything further. But when they were incorporated generally, and when persons all over the world might claim such incorporation, and their acts might be contrary to Imperial laws, the defendants should have the utmost latitude for urging their particular view of the case. Be-

sides these general remarks he might observe that some of the clauses which were objected to were nothing but amplifications of those which had been allowed to stand. The objection to these was not well founded.

CHURCH, J., concurred in the observations, and largely in the conclusions, of Mr. Justice Cross. The first question was whether the course taken was regular, whether the clauses could be stricken out on motion. On this point he was with the respondents. The second question was whether the allegations of the exception were so clearly set forth that the plaintiff was in a position to answer them. On this point he concurred in a portion of the judgment of the Court below. The first three clauses had been allowed to stand. The fourth was subject to modification, but not such as had been made by the judgment appealed from. The fifth had been wholly stricken out, but as the rules and regulations had been referred to in the Act, that which was sufficiently definite for the purposes of the Act was sufficient for an investigation by a court of justice. As to the sixth clause, he agreed to all that the judge retained, but considered that too much had been stricken out. Nos. 7, 8 and 9 were not touched No. 10 was a reiteration of No. 4, and should not have been stricken out. As to No. 11, he thought the judgment was right. No. 12 remained intact. No. 13 had been stricken out, and His Honor thought very properly so.

DORION, Ch. J., for the majority of the court, held, first, that the allegations might be attacked by motion. As to the incidental question which had been raised, that the constitutionality of an act of incorporation could not be attacked by a plea, his own opinion was different, but it was not necessary to decide that question here, and the court pronounced no opinion upon it. His Honor proceeded to read the various allegations of the exception. The first three had been admitted: the defendants had all their rights under these heads—that the society was not incor-

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porated; that it had no right to appear in court; and that the Act was *ultra vires*. Of the fourth, part had been stricken out, and properly so. Pleadings must be founded upon facts distinctly stated, and not upon inferences drawn from facts. This had been distinctly held in the case of the *Queen* v. *Newman*, in which the pleas were twice rejected for vagueness, with liberty to plead again. So, too, in the *Queen* v. *Bradlaugh*, the same doctrine had been followed. In the present case, the references to vows and to rules and regulations were properly stricken out. What were the vows, and what were the rules? No one knew. They should have been stated. How could the Court say whether the plaintiffs were deprived of their civil rights by their vows? The vows were not given. This was not correct pleading. His Honor then referred to the other portions rejected from the exception, and concurred in the correctness of the decision.

Judgment confirmed, Cross and Church, JJ., *diss.*

Maclaren, Leet, Smith & Smith for appellant.

Trudel, Charbonneau & Lamothe for respondent.

(J. K.)

March 22, 1887.

Coram DORION, C.J., TESSIER, CROSS, BABY, JJ.

WILLIAM COOPER ET AL.,
(*Plaintiffs in Court below*),
APPELLANTS;

AND

FREDERICK C. A. McINDOE,
(*Defendant in Court below*),
RESPONDENT.

Disabilities of corporations—Acquisition of immovable property —Arts. 364, 366, *C. C.*

HELD:—(Affirming the judgment of Loranger, J., M. L. R., 2 S. C. 388,) That the provisions of Arts. 364, 366, are general, and apply to all corporations without distinction; and therefore a building society, incorporated by the Dominion Parliament to carry on operations in all the provinces throughout the Dominion, is subject to the disabilities imposed by Art. 366, C. C., and cannot acquire immovable property in the province of Quebec without the permission of the Crown or the authority of the local legislature.

APPEAL from a judgment of the Superior Court, Montreal (LORANGER, J.), Dec. 31, 1885, dismissing the appellants' action. The judgment of the Court below is reported in M. L. R., 2 S. C. 388.

The appellants in their capacity as liquidators of the Colonial Building and Investment Association, an insolvent corporation, sued the respondent to compel him to execute a deed of sale of a parcel of land, which, the declaration alleged, he had agreed to purchase from the Association. This alleged agreement was in writing *sous seing privé*, dated 20th Sept, 1880.

The respondent met the action by two pleas: 1st. "That "the plaintiffs cannot have and maintain any action "against him, the said defendant, for the causes set forth "in their said declaration;

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"That, as stated in the declaration, the plaintiffs are the "liquidators of the Colonial Building and Investment "Association;

"That as such liquidators and as exercising the rights "and actions of the said Association, the plaintiffs cannot "have and maintain their action against the said de- "fendant.

"And defendant avers:—

"That the said Colonial Building and Investment Asso- "ciation was an association incorporated by the Parlia- "ment of Canada in the year 1874, by statute 37 Vic., "cap. 108, and continued to exist as a corporation until "placed in liquidation on the 17th September, 1884, and "during the said period, the said Company or Association "exclusively carried on business in the Province of Que- "bec and confined its operations to the said Province;

"That by the laws in force in the Province of Quebec, "corporations are not entitled to acquire or hold immov- "able property unless thereto authorized by some spe- "cial law emanating from a legally constituted authority "having power to make such law, or unless the said cor- "porations obtain the permission of the Crown to so "acquire and hold property;

"That the said Colonial Building and Investment Asso- "ciation had no power in virtue of its Act of Incorpora- "tion to acquire, hold or sell real or immovable property "within the limits of the province of Quebec, without "obtaining the consent and permission of the Crown, or "without obtaining the authority of the Legislature of "the province of Quebec;

"That the said Colonial Building and Investment Asso- "ciation never obtained the said permission of the Crown "as required by the laws in force in this province, and "never obtained the authority of the Legislature of the "province to authorize the said corporation to acquire "real estate in the said province, or to sell, lease, hypo- "thecate, promise to sell or otherwise deal with the same;

"That the said pretended contract was *ultra vires* of the "said Association, and was illegal and cannot be enforced,

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"and the plaintiffs have no right to ask that the same be "enforced, or carried out, or to ask and demand that de- "fendant be condemned to be compelled to sign and "complete the deed of sale referred to in plaintiffs' de- "claration."

The judgment appealed from maintained the above plea, and dismissed the appellants' action.

The respondent submitted:—The Colonial Building and Investment Association was incorporated by Act of the Dominion Parliament (37 Vic., cap. 103), in 1874.

This Act nominally gave the Association power to "buy, sell and lease landed property."

The Association is not restricted by the Act to any one province, although its head office was in Montreal; but it is proved that from the date of incorporation until the proceedings in liquidation, its operations were exclusively confined to the province of Quebec.

Our contention then is:

1o. That the association never having obtained a charter from the local Legislature empowering it to acquire real estate in this province, and never having procured a license or permission from the Lieutenant-Governor in council allowing it to do so, had no power under its charter to acquire, hold or sell real estate in the province of Quebec.

The first question which arises is: What are the rights of corporations with respect to the acquisition of immovable property in this province?

This question has been elaborately discussed and finally decided in the Judicial Committee of the Privy Council, and it was held that the Edict of Louis XV, issued in Canada in 1743 and in France in 1749, applied to *all* corporations and incapacitated them from acquiring as well as from holding lands, without the permission of the Crown or the authority of the Legislature.

Chaudière Gold Mining Co. v. *Desbarats*, 17 L. C. J. 275, and L. R., 5 P. C. 277.

Vide also: *Edits et Ordonnances*, pp. 596 & 781; *Pothier, Traité des Personnes*, Tit. 7, Art. 1; *Civil Code*, Art. 366.

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Now, it has been held by the Privy Council that the right to repeal or modify this law falls within No. 13 of section 92 of the British North America Act, viz.: "Property and Civil Rights within the province," and belongs exclusively to the Provincial Legislature.

Colonial Building and Investment Association v. *Attorney General*, 27 L. C. J. 308.

It follows, therefore, that unless the Association has obtained from the proper authorities, namely the legislature of Quebec, permission to acquire lands, it has acquired them illegally.

It is fortunate for the defendant that the rights of the Colonial Building and Investment Association have already been examined by the courts in the case last above cited.

The proceeding in that case was a *Quo Warranto* based on the allegation that the Dominion Parliament had no power to incorporate the Association at all, and praying that the corporation be declared to be illegally incorporated, and dissolved, and that it be prohibited from acting in future as a corporation.

The Superior Court quashed the writ of *Quo Warranto*, but before this Court (Monk, J., *diss.*), this judgment was reversed and the Company was declared to have no right to act as a corporation in buying lands, &c., and was prohibited from acting as a corporation in the province of Quebec.

From the judgment of this Court an appeal was taken to the Privy Council by the Association.

The judgment of the Privy Council reversed the judgment of the Court of Queen's Bench on the ground that it went beyond the petition, in declaring that though lawfully incorporated, the Association had violated provincial laws in conducting its operations. The petition asked the dissolution of the association because it was illegally incorporated. The Privy Council said the Court went beyond the record in founding their judgment on the violation of the mortmain laws, and in making too sweeping a prohibition.

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But this Court expressly decided that the Colonial Building Association had no right to acquire or hold real estate in the province, and the Privy Council, while declaring formally that this question was not raised by the issues, inferentially admits that had the question been properly presented before it, and had it been proved that the Association had never obtained the consent of the Crown or the Legislature in addition to its charter, it would have confirmed the judgment of the Court of Appeals on this point.

It is quite clear from the judgment of the Privy Council:

(1) That the Dominion Parliament had power to incorporate and to give a *capacity* to acquire real estate;

(2) That the Association, however, could not actually acquire or hold real estate in this province without conforming to provincial laws on the subject.

The judgment reads:—

"What the act of incorporation has done is to create a "legal and artificial person with capacity to carry on cer- "tain kinds of business, which are defined, within a given "area, viz.: throughout the Dominion. Among other "things, it has given to the Association power to deal "in land and buildings, *but the capacity so given only en- "ables it to acquire and hold land in any province consistently "with the laws of that province relating to the acquisition and "tenure of land. If the Company can so acquire and hold it, the "Act of incorporation gives it capacity so to do.*" 27 L. C. J., p. 309.

Vide also *Citizens Ins. Co.* v. *Parsons*, 7 L. R., App. cases, 96.

The Privy Council also says: "If the company is really "holding property in Quebec without having complied "with the law of that province, or is otherwise violating "the provincial law, there may be found proceedings ap- "plicable to such violations; though it is not for their "Lordships to anticipate them, or to indicate their form." 27 L. C. J., p. 310.

The present case is one of those contemplated by their

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Lordships. The respondent objects to accept lands which the Association acquired and held illegally and in contravention of the provincial laws of mortmain, which it cannot legally sell or transfer and to which it can give no good or valid title. The respondent submits, therefore, that not having complied with the provincial laws on the subject of mortmain, without which compliance it could not legally hold lands in this province, the Association cannot compel him to execute a deed.

DORION, C. J., delivering the judgment in appeal, said the Court were of opinion that the judgment appealed from must be confirmed. His Honor referred to the decision of the Privy Council in the case, cited by respondent, of the *Chaudière Gold Mining Co. & Desbarats*, in which a similar point was presented. The omission could easily be supplied by applying to the Provincial Legislature for an act to authorize the society to acquire and sell real estate for the purposes of their business.

Judgment confirmed.

Laflamme, Huntington, Laflamme & Richard for appellants.
McGibbon & McLennan for respondent.

(J. K.)

*** In consequence of the commencement of Reports published by the General Council of the Bar, P. Q., the present Series is brought to a close.

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ACCOUNT.

Action for reformation of account—Form of judgment therein.] In an action against an agent for reformation of an account rendered, where the judgment ordered the account to be reformed within thirty days, by adding to the balance offered, certain sums proved to have been omitted in the account, and the judgment proceeded to condemn the defendant to pay the amount omitted, before the balance due and payable had been established in due course of law, *held*, that the latter part of such judgment was irregular and erroneous. *Stephens & Gillespie*, 289.

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—— *En dénonciation de nouvel œuvre. See* NUISANCE, 57.

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—— *Interlocutory judgment.*] An interlocutory judgment rejecting an exception to the form which objected to the insufficiency of the allegations of the declaration, is susceptible of appeal, being a matter which cannot be remedied by the final judgment. *McGreevy & Beaucage*, 59.

ARBITRATION.

Under Railway Act.] *See* RAILWAY ACT, 110.

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ASYLUM FOR THE INSANE. *See* NUISANCE, 57.

AWARD. *See* RAILWAY ACT, 110.

BANK.

Advance made upon security of shares of another Bank—Obligation to return shares on repayment of advance.] Where in order to evade the law prohibiting the acceptance by one Bank of the stock of another Bank as security for a loan (46 Vict., ch. 45, s. 2), an advance was made by a Bank, and stock of another Bank was transferred as security to the cashier of the lending Bank, and the transaction was duly noted in the books of the Bank, it was held that the owner of the shares so transferred was entitled to reclaim them from the Bank, or to get their value, when the debt was paid for the security of which the shares were transferred as aforesaid. The prohibition of the law applies to the Bank and not to the borrower. (Dorion, C.J., and Church, J., diss.) *Exchange Bank of Canada & Fletcher*, 11.

—— *Powers of—Contract of guarantee—Ultra vires.*] A bank cannot validly enter into a contract of suretyship, guaranteeing the payment by a customer of the hire of a steamship under a charter party; and where the bank has derived no benefit from such contract, a claim made thereon against the bank in liquidation will be dismissed. *Watts & Wells*, 387.

BILL OF LADING. *See* CARRIER, 1; PLEDGE, 147.

BORNAGE.

Remedy by action en bornage.] *See* INJUNCTION, 196.

BRIDGE. *See* MUNICIPAL LAW, 368.

BUILDING SOCIETY.

Acquisition of Immovable Property.] *See* CORPORATION, 481.

—— *Pledge—Irregular transfer of shares—Insolvency—Rights of creditors.*] A by-law of a building society required that a shareholder should have satisfied all his obligations to the society before he should be at liberty to transfer his shares. P., a director, in contravention of the by-law, induced the secretary of the society to countersign a transfer of his shares to the Banque Ville Marie as collateral security for an amount he borrowed from the bank, and it was not until P.'s assignment in insolvency that the other directors of the society knew of the transfer to the bank. At the time of his assignment P. was indebted to the society in a sum of $3,744, for which amount, under the by-law, his shares were charged as between P. and the society. The society immediately paid the bank the amount due by P. and took an assignment of the shares. The shares being worth more than the amount due to the bank, the curator to the insolvent estate of P. brought suit claiming the shares as forming part of the insolvent's estate, and with the action tendered the amount due by P. to the Bank. The society claimed that under the by-laws the shares were pledged to them for the whole amount of P.'s indebtedness to them. The Superior Court held that the payment by the society of the bank's claim annulled the transfer made by P. in fraud of the society's rights, and that

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the shares in question must be held as having always been charged under the by-law with the amount of P.'s indebtedness to the society, and that his creditors had only the same rights in respect of these shares as P. himself had when he made the abandonment of his property, viz., to get the shares upon payment of P.'s indebtedness to the society. On appeal to the Queen's Bench: *Held*, that the possession of the shares had passed from P. to the bank; that the right to recover the shares from the bank, on payment of its advances thereon, was vested in P., and passed to his creditors upon his insolvency; and that after P.'s insolvency it was not competent for the society to acquire any privilege or pledge over the shares to the prejudice of P.'s creditors by paying the claim of the bank. *Daveluy & La Société C. F. de Construction*, 417.

BY-LAW. *See* MUNICIPAL LAW, 400.

CARRIER.

Bill of lading—Place of destination of goods beyond carrier's route.] Where the place of destination of goods is beyond the carrier's route, and he receives the goods under a bill of lading to the terminus of his route, and carries them safely to that point, to which alone he received the freight, the fact that at the request of the shipper he undertook to deliver the goods to another carrier to complete the transportation, does not make the first carrier responsible for the delivery of the goods at the place of destination. *Jeffrey & Canada Shipping Co.*, 1.

CHARITABLE INSTITUTION. *See* TAXATION, 299.

COMMERCIAL TRAVELLER.

Order obtained by.] *See* SALE OF MOVABLES, 153.

COMPANY.

Shareholder.] (1) A shareholder of a company is not entitled to exercise the rights of the company in his own name, and cannot oppose the sale of an immovable belonging to the company. (2) A promise of retrocession by the majority of the shareholders of a company is null, the company alone having the power to make such an agreement. *McNaughton & Exchange National Bank*, 180.

CONSTITUTIONAL LAW.

Executive power—Commission of inquiry—R.S.Q. 596, 598—*Prohibition, Writ of.*] (1) An inquiry into an alleged attempt to influence and corrupt members of the provincial legislature is a matter connected with the good government of the province, and the conduct of the public business therein, within the meaning of R.S.Q. 596. (2) A commission of inquiry issued by the Lieutenant-Governor-in-Council under the said section, has the same power to enforce the attendance of witnesses, and to compel them to give evidence before it, as is vested in any Court of law

CONSTITUTIONAL LAW—*Continued.*

in civil cases, and has therefore the power to punish by fine or imprisonment, or both, any contempt of its authority by any person summoned as a witness refusing to appear, or to answer questions put to him concerning the matters which are the subject of such inquiry. (3) Under the provisions of the B.N.A. Act, 1867, the provincial legislature was empowered to enact the provisions contained in Articles 596 and 598 of the Revised Statutes of Quebec. (4) Even if the commissioners, in the course of the inquiry which they were duly authorized to make, had permitted some irregular or illegal questions to be put to a witness, their improper ruling on the subject could not have authorized the issue of a writ of prohibition, which only applies to cases of want of jurisdiction, and not to cases of erroneous judgments, for which other remedies are provided. *Turcotte & Whelan*, 263.

—— *Sale of intoxicating liquors—Municipal corporation—Art.* 561, *M.C.—R.S.Q.* 6118.] Article 561 of the Municipal Code, as amended by 51-52 Vict., ch. 29, s. 6 (R.S.Q. 6118), by which a municipality is authorized to prohibit the sale of intoxicating liquors in quantities less than two gallons, within the limits of the municipality, is within the powers of the provincial legislature. *Corporation of Huntingdon & Moir*, 281.

CONTRACT.

Architect—Submission of plans—Damages.] The plaintiff, an architect, in response to a public advertisement, offered plans in competition for a building about to be erected by the defendant, on being assured by the president of defendant's board that all the plans sent in would be submitted to disinterested experts before a choice was made. The plans were not submitted to experts, and those finally adopted were submitted by an architect who was not a competitor within the terms of the public advertisement. *Held*, that the plaintiff was not entitled to damages, it being evident that the defendant was not bound to adopt the plans which might be recommended by the experts, and no partiality or bad faith in the selection being proved. *Walbank & Protestant Hospital for the Insane*, 166.

—— *Receipt given through error.*] *See* ERROR, 137.

—— *See* SALE.

CORPORATION.

Disabilities of—Acquisition of immovable property—Arts. 364, 366, *C.C.*] The provisions of Arts. 364, 366, C.C., are general, and apply to all corporations without distinction; and therefore a building society, incorporated by the Dominion Parliament to carry on operations in all the provinces throughout the Dominion, is subject to the disabilities imposed by Art. 366, C.C., and cannot acquire immovable property in the Province of Quebec without the permission of the Crown or the authority of the local legislature. *Cooper & McIndoe*, 481.

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Appeal from decision of.] *See* MUNICIPAL LAW, 368.

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CRIMINAL LAW.

Conjugal union—Cohabitation—53 Vict. (D.) ch. 37, s. 11.] The mere fact of cohabitation between two persons, each of whom is married to another person, will not sustain a conviction under R.S.C., ch. 161, as amended by 53 Vict. (D.), ch. 37, s. 11. *Reg.* v. *Labrie*, 211.

—— *Embezzlement—Evidence.*] On the trial of a secretary treasurer of a municipal corporation for embezzlement, evidence of a general deficiency having been given, accompanied by evidence of unlawful appropriation by the prisoner of moneys received by him by virtue of his employment, *held*, that the conviction was right, though it was not proved that a particular sum coming from a particular person on a particular occasion, was embezzled by the prisoner. (*R.* v. *Glass*, 1 Leg. News, 41, followed.) *Reg* v. *Slack*, 408.

—— *Forgery—Order for the payment of money.*] The prisoner was convicted of forging an order for the payment of money. It appeared that he had forged an order purporting to be signed by a foreman, addressed to his employers, requesting them to pay the person therein named, or order, a specified sum. This was the mode adopted by the foreman for certifying to his employers that so much was due for wages to the persons named in the orders. *Held*, that the instrument in question was an order for the payment of money, and that the conviction should be affirmed. *Reg.* v. *Bowen alias Cole*, 468.

—— *Larceny—General deficiency.*] Evidence of a general deficiency in the books of a clerk in a bank will not alone support an indictment for larceny. There must be some proof of a taking. *Reg.* v. *Glass*, 405.

—— *Obtaining a valuable security by false pretences—Concealment—Amendment of indictment.*] The prisoners obtained a subscription for a firemen's fund, concealing the fact that one-third only of the amount was to go to the fund. The subscriber deposed that he would not have subscribed if this fact had been disclosed to him. *Held* (1) that the concealment as to the application of the amount constituted a false pretence. (2) The amendment of the indictment, by substituting the name of a different person for the person named in the indictment to whom the false representations were made, is justifiable. (3) The cheque of a firm, before it is endorsed by the payee, and while still in the hands of one of the members of the firm, is not a valuable security

CRIMINAL LAW—*Continued.*

within the terms of the Larceny Act, R.S.C., ch. 164. *Reg.* v. *Ford and Graham*, 413.

—— *Procedure in criminal cases—Reserved case—Amendment—Notice to prisoner to produce document—Verbal evidence.*] (1) A Reserved Case will not be sent back to be amended by the judge who reserved it, upon the mere allegation of the prisoner or his counsel that the facts are not accurately stated therein. (2) A prisoner is not entitled to complain of short notice to produce a document at his trial, where it is shown that the document in question was in the possession of a person under the control of the prisoner and his counsel on the day of the trial. (3) The prisoner having in the circumstances declined to produce the document, secondary evidence was admissible. *Reg.* v. *Bourdeau*, 176.

—— *Procedure in criminal cases—Writ of error—R.S.C., ch.* 174, *s.* 265.] The issue of a writ of error will interrupt a sentence which has been partially undergone before the issue of the writ; and in such case, where the offence is a misdemeanor, the prisoner may be admitted to bail. *Ex parte Woods*, 163.

—— *Refusal to provide for wife.*] On indictment of a husband for refusal to provide for his wife, the jury should not consider evidence as to the manner of living between husband and wife previous to the time laid in the indictment, or promises made by the husband after his arrest. *Reg.* v. *Arent*, 288.

—— *Writ of error—Plaintiff in contempt.*] Where the plaintiff in error, who had been convicted of a misdemeanour, was liberated on bail to appear at the ensuing term of the Court of Queen's Bench sitting in appeal and error, and on his default to appear his bail was declared forfeited, he is not entitled to be heard by counsel on the merits of the case, in his absence. *Woods* v. *Reg.* 232.

DAM. *See* WATER-COURSE, 233.

DAMAGES.

Corporation—Negligence—Solatium.] (Affirming the judgment of Papineau, J., M.L.R., 2 S.C. 56), The children of a person killed by an accident caused by the bad condition of a public street, are entitled, without proof of special damage, to damages by way of *solatium* for the loss of a parent. Cross, J., dissenting. [But this decision was reversed by the Supreme Court of Canada, and the action was dismissed. See 14 Can. S.C.R. 741.] *Cité de Montréal & Labelle*, 468.

—— *Error as to accessory of immovable sold.*] *See* SALE OF IMMOVABLE, 36.

—— *How treated by Court of Appeal.*] *See* APPEAL, 24.

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EMBEZZLEMENT. *See* CRIMINAL LAW, 408.

ERROR.

Receipt given through error—Parol evidence.] *S.* brought suit to compel *V.* to render an account of the sum of $2,500, which *S.* alleged he paid *V.* on the 6th October, 1885, to be applied to *S's* first notes maturing, and in acknowledgment of which *V.'s* bookkeeper gave the following receipt:—"Montreal, October 6, 1885. Recd. from Mr. D. S. the sum of $2,500 to be applied to his first notes maturing. M.V. (Fred.)" *V.* pleaded that he never got the $2,500, and that the receipt was given in error by his clerk, and that it should be for a case of sealskins, and not for $2,500. The clerk and other witnesses were examined without objection to prove error. *Held*, that parol evidence is admissible in commercial matters to prove error in a written receipt given by a clerk. *Schwersenski & Vineberg*, 137.

EVIDENCE.

Proof of claim—Account sales.] Where appellants, by a claim filed upon an estate in liquidation, claimed indemnity for an alleged loss made by them upon shipments of cattle from Boston to Liverpool, *held*, that the account sales received by claimants from their Liverpool agents were insufficient, *per se*, to make proof of the loss. *Hathaway & Chaplin*, 317.

—— *Proof of physician's services—Rebutting evidence.*] *See* PHYSICIAN, 171.

—— *To prove error in receipt.*] *See* ERROR, 137.

EXCEPTION TO THE FORM. *See* PROCEDURE, 471.

FALSE PRETENCES. *See* CRIMINAL LAW, 413.

FOREIGN CORPORATION.

Quality to sue.] *See* QUALITY TO SUE, 456.

FORGERY.

Order for the payment of money.] *See* CRIMINAL LAW, 468.

FRAUD AND FALSE REPRESENTATION.

Principal and agent—Transfer of fire insurance—Contract—Agent—Powers of—Art. 1735, *C.C.*] The defendant, an insurance broker, was the agent in Montreal of two foreign insurance companies, one of which instructed him to cancel a certain risk in Montreal, which the defendant had accepted. After suggesting a reconsideration, and the order being repeated, he complied, and then immediately transferred the risk to the other company for which he was agent, without informing them that the risk had been refused by the first company. He made the transfer moreover, without the knowledge of the insured and without notice to them. On the same day a fire occurred in the premises insured, and the loss was paid by the company to which the risk had been transferred. In an action afterwards brought by the latter against the agent, to be reimbursed the amount of the loss, which they alleged they had paid without cause, and upon false representations by the agent: *held*, (Affirming the judgment

FRAUD AND FALSE REPRESENTATION—*Continued.*

of Wurtele, J., M.L.R., 5 S.C. 262,) that the transfer of the risk being made by the defendant in good faith, before the fire occurred, and in accordance with the custom of insurance brokers in Montreal, there was no fraud on his part, and he could not be held liable. *Connecticut Fire Insurance Co. & Kavanagh*, 323.

HABEAS CORPUS.

Habeas Corpus in civil matters—Magistrate's Court, Montreal—Illegal order of imprisonment—Art. 1052, *C.C.P.*] Where an order made by an inferior court is manifestly illegal, as where the guardian of goods under seizure is condemned to be imprisoned until he gives up the goods or pays the value thereof, and the value is not mentioned in the order, the discharge of the person imprisoned under such order, will be ordered, upon a petition for a writ of *habeas corpus*. *Ex parte Stephens*, 349.

HUSBAND AND WIFE. *See* PROCEDURE, 218.

INJUNCTION.

To prevent encroachment—Boundaries not determined—Bornage.] The remedy by writ of injunction does not lie where another adequate remedy exists; and so, in the case of a dispute between adjoining proprietors of mining lands, where an encroachment is complained of, and it appears that the limits of the respective properties have not been legally determined by a *bornage*, an injunction will not lie to prevent the alleged encroachment, the proper remedy being an action *en bornage*. *Anglo-Continental Guano Works & Emerald Phosphate Co.*, 196.

INJUNCTION. *See* NUISANCE, 57.

INSANE ASYLUM. *See* TAXATION, 299.

INSOLVENCY. *See* BUILDING SOCIETY, 417.

INSURANCE, ACCIDENT.

External injuries producing erysipelas—Proximate cause of death—Immediate notice of death—Waiver.] An accident policy issued by the appellants was payable "within thirty days after suffi-
"cient proof that the insured, at any time during the continu-
"ance of this policy, shall have sustained bodily injuries effected
"through *external, accidental and violent means*, within the intent
"and meaning of this contract and the conditions hereunto an-
"nexed, *and such injuries alone shall have occasioned death* within
"ninety days from the happening thereof. . . . Provided
"always that this insurance shall not extend to hernia, *nor to*
"*any bodily injury happening directly or indirectly in consequence of*
"*disease, nor to any death or disability which may have been caused*
"*wholly or in part by bodily infirmities or disease*, existing prior or
"subsequent to the date of this contract, or by the taking of

INSURANCE, ACCIDENT—*Continued.*

" poison, or by any surgical operation, or medical or mechanical " treatment, *nor to any case except where the injury aforesaid is the* " *proximate or sole cause of the disability or death.*" The insured was accidentally wounded in the leg by falling from a verandah, and within four or five days the wound, which appeared at first to be a slight one, was complicated by erysipelas, from which death ensued twenty-three days after the accident. There was some conflict in the evidence as to whether the erysipelas resulted solely from the wound, but the Court below found, on the facts, that the erysipelas followed as a direct result from the external injury. *Held*, (Affirming the judgment of Tellier, J., M.L.R., 6 S.C. 3), that the external injury was the proximate or sole cause of death within the meaning of the policy, and that the respondent was entitled to recover.

The policy also provided that "in the event of any accident or in- " jury for which claim may be made under this policy, immedi- " ate notice must be given in writing, addressed to the manager of " this company, at Montreal, stating full name, occupation and " address of the insured, with full particulars of the accident and " injury; and failure to give such immediate written notice shall " invalidate all claims under this policy." The local agent of the company at Simcoe, Ont., after receiving written notice of the accident before death, was verbally informed of the death four days after it took place, and thereupon stated that he would require no further notice, and that he had advised the company. Further interviews and correspondence took place during the following days between the local agent and the claimants with respect to the papers required, but the formal notice was not sent to the head office until sixteen days after death. The manager of the company acknowledged receipt of proofs of death, without complaining of want of notice, and ultimately declined to pay the claim on the ground that the death was caused by disease, and that therefore the company could not recognize their liability. *Held*, that the company had received sufficient notice of death to satisfy the requirements of the policy, and that, in any event, they had expressly waived any objections which they might have urged in this regard, by declining to pay the claim on other grounds. (Reversed by Supreme Court.) *Accident Insurance Co. of N.A. & Young*, 448.

—— *Risk incidental to employment—Breach of contract.*] M., who was described in the application for insurance as "Superintendent of the Intercolonial Railway," was insured by the company appellant, against accidents. By one of the conditions of the policy it was stipulated as follows:—"The insured must at all times observe due diligence for personal safety and protection, and in no case will this insurance be held to cover either death or injuries occurring from voluntary exposure to unnecessary or obvious danger of any kind, nor death or disablement . . . from

INSURANCE, ACCIDENT—*Continued.*

getting or attempting to get on or off any railway train, etc., while the same is in motion." M., when travelling on the business of his railway, was killed while getting on a train in motion. *Held*, that inasmuch as M. was insured as superintendent of a railway, and there was evidence that his duties required him to get on and off trains in motion, of which fact the insurers had knowledge, the condition did not apply, and the company was liable. *Accident Insurance Co of N.A. & McFee*, 255.

INSURANCE GUARANTEE.

Conditions of policy—Interpretation.] By a condition of the policy it was provided that the company should make good to the employer such pecuniary loss as might be sustained by him by reason of the dishonesty of the employee "committed and discovered during the continuance of this agreement, and within three months from the death, dismissal or retirement of the employee." The policy lapsed, and a defalcation was discovered four months afterwards. *Held*, (By the Superior Court), that the company was not liable in respect of such defalcation, inasmuch as it was not *discovered* as well as *committed* during the continuance of the agreement.—The policy also contained a clause that on the discovery of any fraud or dishonesty on the part of the employee, the employer should immediately give notice to the company. A defalcation was discovered April 6, and the company was not notified until April 17, when the employee had left the country. *Held*, (By the Court of Queen's Bench), that the employer was not entitled to recover under the policy, the condition as to notice not having been complied with. *Commercial Mutual Building Society & London Guarantee & Accident Co.*, 307.

INSURANCE, FIRE.

Custom—Transfer of risk.] *See* FRAUD AND FALSE REPRESENTATION, 323.

INTOXICATING LIQUORS, PROHIBITION OF SALE OF.

See CONSTITUTIONAL LAW, 281.

JUDGMENT.

Execution of.] *See* PROCEDURE, 451.

LARCENY. *See* CRIMINAL LAW, 405.

LEGISLATIVE POWERS. *See* CONSTITUTIONAL LAW.

LESSOR AND LESSEE.

Change of destination of premises leased—Resiliation of lease—Art. 1624, *C.C.*] Where premises were leased "to be used and occupied "only for the purposes of concerts, lectures, fairs, bazaars, clubs, "societies, public exhibitions and meetings in accordance with "law," and the lessee sublet to parties who used the premises

LESSOR AND LESSEE—*Continued.*

for the religious meetings of the Salvation Army, an organization which was obnoxious to a large portion of the inhabitants of the locality, and windows were broken and other damage was done to the property in consequence, and insurance was refused by the insurance companies on account of the increased risk, *held*, that there had been a change of destination sufficient to entitle the lessor to obtain the rescission of the lease. *Pignolet & Brosseau*, 77.

—— *Lease—Tacit reconduction—Notice to terminate—Art.* 1067, *C.C.*] Where a lease in writing is continued by tacit reconduction, the notice necessary to terminate it must be in writing. *Lacroix & Fauteux*, 40.

LIQUIDATOR.

To partnership—Action for dissolution pending.] *See* PARTNERSHIP, 437.

MAGISTRATE'S COURT, MONTREAL,

Court of inferior jurisdiction.] The Magistrate's Court for the district of Montreal, established under the authority of 32 Vict. c. 23, now Arts. 2498 *et seq.*, R. S. Q., is a court of inferior jurisdiction. *Exparte Stephens*, 349.

MANDAMUS.

See SUPERINTENDENT OF EDUCATION, 330, 390.

MUNICIPAL LAW.

By-law—Grounds of nullity.] The corporation respondent passed a by-law on the 11th September, 1882, granting a bonus to a railway. At a meeting of council on the 16th September, 1882, a change was made in the by-law, extending the date for finishing the road from 1st February, 1883, to 15th July, 1883. Before the meeting of the 16th September the by-law as originally drawn was published in one issue of the *Ormstown Courier*, and after the 16th September it was published, as changed, in two issues of the *Courier*. Counting from the 16th September only 19 clear days remained before the 6th October, the first day of polling. On petition by municipal electors, 4th May, 1883, to annul the by-law on the ground (1) that the by-law voted on was not the one passed or advertised, (2), that if the by-law was considered as being of the 16th September, it could not be submitted to the electors on the 6th October: *Held*, (1) that no substantial injustice being done, the electors having acquiesced by voting, and the by-law having been approved by the lieutenant-governor-in council without protest, the petition should be dismissed. (2) The change made in the by-law on the 16th September was not a *faux*. *Simpson & Corporation of Parish of Ste. Malachie d'Ormstown*, 400.

—— *County council—Bridge—Procès-verbal—Arts.* 535, 941, *M. C.*] (1) County bridges are under the exclusive control of the county council. The decisions of the county council are subject to appeal to the

MUNICIPAL LAW—*Continued.*

Circuit Court of the county or district, and may be quashed for illegality. This special remedy, however, does not deprive the Superior Court of the control which it has over every corporation, when such corporation exceeds or illegally uses its powers. (2) Under Art. 941, M. C., the charges imposed by a *procès-verbal* for the cost of a county bridge should be collected by the officers of the local municipality. (3.) In the matter of municipal taxation the persons on whom taxes are imposed, whether as proprietors or occupants, should be clearly indicated. (4.) The county council cannot charge the cost of a county bridge upon the local municipality, unless the local council has passed a by-law under Art. 535, M. C. *Corporation du comté de Verchères & Corporation du Village de Varennes*, 368.

—— *Prohibition of sale of intoxicating liquors.*] *See* CONSTITUTIONAL LAW, 281.

—— *Town Council—Assessment for debts of town—Appeal—40 Vict. (Q.) ch. 29—Arts. 513, 514, 515, M. C.*] (1.) A town council, under the Town Corporations General Clauses Act. 40 Vict. (Q.) c. 29, may, by resolution, order the secretary-treasurer to levy a fixed sum to pay a debt of the corporation, which the secretary-treasurer will do by a special collection roll. (2.) Towns incorporated by special Act are obliged to contribute to the cost of a building for the use of the Circuit Court and registry office of the county in which they are situate. (3.) The amount to be contributed by each town may be fixed by the county council, in proportion to the total value of assessable property in the town, such total value being furnished to the county council by a certificate of the secretary-treasurer of the town. (4.) A judgment of the Superior Court, in an action to set aside a resolution of a town council to give effect to proceedings of the county council under the above Act, is appealable. *McConnell & Corporation of the Town of Lachute*, 99.

—— *Violation of Domicile—Arrest without warrant—Damages.*] Officers of police in the employment of a municipal corporation have no right to enter the dwelling of a citizen in the night time, without a warrant, and arrest him on mere suspicion that a felony has been committed; and the corporation will be held responsible in damages for such illegal arrest. *Pratt & Charbonneau*, 24.

NEGLIGENCE.

Child killed on street railway.] Where a child, two years of age, through the negligence or want of vigilance of its parents, is allowed to leave its residence and get on the track of a street railway, and is killed there by a car of the railway company, without any fault on the part of the employees of the company, an action of damages by the father of the child will not be main-

NEGLIGENCE—*Continued.*

tained. (Judgment of Loranger, J., M. L. R., 7 S. C. 10, reversed.) *Compagnie de Chemin de Fer à Passagers de Montréal & Dufresne*, 214.

—— *See* DAMAGES, 468.

NUISANCE.

Asylum for the Insane—Action to compel discontinuance of erection.] Where buildings are being erected for a legal and proper object, such as a hospital for the insane, and there is no proof that they are causing or likely to cause any injury to the properties of the neighbours or any diminution of their value, owing to causes for which the proprietors of the asylum would be liable, adjoining proprietors have no right to ask by injunction that the erection of the buildings be discontinued. *Crawford & Protestant Hospital for the Insane*, 57.

PARTNERSHIP.

Action for dissolution pending—Appointment of liquidator.] The fact that an action is pending for the dissolution of a co-partnership, the management of the business of which, by the deed of co-partnership, was entrusted to the partner defendant, is not a sufficient ground for depriving him of the management, and for the appointment of a liquidator, *Gerhardt & Davis*, 437.

PHYSICIAN.

Proof of services—C. C. 2260; 32 *Vic.* (*Q.*), *c.* 32, *s.* 1—*R. S. Q.* 5851.] The oath of the physician or surgeon, which, under R. S. Q. 5851, makes proof as to the nature and duration of the services, can only be rebutted by the clearest and most precise testimony, which was not found by the Court in the present case, in which, by the evidence of doctors who had not seen the patient before or during the illness, and who did not speak positively, it was sought to reduce a physician's account, for treating a case of fracture of the collar bone, from $175 to $100. *Bourgeau & Brodeur*, 171.

PLEADING. *See* PROCEDURE.

PLEDGE.

Of goods for pre-existing debt—Transfer of bill of lading—R. S. Q. 5646.] The transfer of goods, then stored in New York, by a debtor apparently solvent, to his creditor, by endorsement of the bill of lading, as security for an antecedent indebtedness as well as for a note at the time discounted by the creditor, is valid, and the creditor may apply the proceeds of the pledge to the antecedent debt, and recover on the note discounted at the time. *Watson & Johnson*, 147.

—— *See* BUILDING SOCIETY, 417.

POLICE, POWERS OF.

Violation of Domicile—Arrest without warrant.] *See* MUNICIPAL CORPORATION, 24.

PRINCIPAL AND AGENT.

Transfer of fire insurance risk] *See* FRAUD AND FALSE REPRESENTATION, 323.

PRIVILEGE.

Unpaid Vendor—Privilege of.] The privilege of *bailleur de fonds* does not give the unpaid vendor the right of opposing the seizure and sale of the immovable subject to it. *McNaughton & Exchange National Bank*, 180.

PROCEDURE.

Desistment from part of judgment—Costs.] Where the plaintiff desisted from part of a judgment, and obtained *acte* of *désistement*, pending an appeal by the defendant from the judgment, the respondent should be held for the costs of the appeal only up to the time when he obtained *acte* of *désistement* as aforesaid, and the appellant having failed on the other grounds of appeal, should be condemned to pay the costs of the appeal from the date when *acte* was obtained. *Stephens & Gillespie*, 289.

—— *Exception to the form—Motion to strike out allegations—Art.* 135, *C. C. P.*] (1) Vague and indefinite allegations in an exception to the form may be rejected on motion of the adverse party. (2) The allegations of a pleading must be sufficiently clear and distinct to enable the opposite party to reply thereto. So, where the defendants by an exception to the form alleged that the Act incorporating the plaintiff, *La Compagnie de Jésus*, was *ultra vires*, because the persons incorporated were incapable of exercising any civil rights in the province by reason of the vows which they had taken—without specifying the vows—and because the object of their society was the promulgation of doctrines, contrary to Imperial Statutes, set forth in certain works filed as exhibits —without specifying the doctrines objected to,—these and other like allegations were rejected as vague and lacking precision. *Mail Printing Co. & Compagnie de Jésus*, 471.

—— *Execution of judgment of the Court of Queen's Bench in appeal—Registration—Taxation of costs.*] (1) A judgment rendered by the Court of Queen's Bench sitting in appeal, is executory without the formality of registration in the office of the Court from which the appeal was taken. (2) Where the taxation of costs in appeal is regular on its face, and there is no proof of alleged want of notice to the adverse party, such taxation will be maintained. *Wells & Burroughs*, 451.

—— *Husband and wife—Wife erroneously described as separated as to property—Exception to the form—Amendment—Husband summoned only to authorize his wife—Cannot be made a party personally on motion to amend.*] (1.) The fact that the wife has assumed the quality of separated as to property, in a deed of lease to her, does not debar her, in an action against her in that quality, from pleading by exception to the form, and proving, that she is common as to property with her husband. (2.) The plaintiff, under such circumstances, will be allowed to amend the writ and

PROCEDURE—*Continued.*

declaration by describing the wife as common as to property. (3.) Where the husband has been summoned merely for the purpose of authorizing his wife (defendant), the plaintiff will not be allowed, on a motion to amend the original writ and declaration, to make the husband a party to the action personally, without summoning him in his personal capacity. *O'Connor & Inglis*, 218.

—— *Pleading—Demurrer—Sufficiency of allegations—Compound interest.*] Where the plaintiff claimed a certain capital sum, and also computed compound interest as well as interest thereon, and alleged as to the total amount, "which said last mentioned sum the "said defendant hath often admitted to owe and promised to pay "to the said plaintiff, but has always neglected to do so,"—*held*, that the allegations of the declaration justified a conclusion for the whole amount, and that it was not necessary to allege specially that the defendant had promised to pay compound interest. *Mc Vey & Mc Vey*, 305.

—— *Pleading—Vagueness and insufficiency of allegations of demand—Exception to the form.*] Where the right of action is not denied by the defendant, but he complains of the vagueness and insufficiency of the allegations of the declaration, it is matter for an exception to the form, and not for a demurrer, or for a motion for particulars. *McGreevy & Beaucage*, 89.

—— *See* APPEAL.

PROHIBITION, WRIT OF.

See CONSTITUTIONAL LAW, 263.

PROMISSORY NOTES.

Transfer without endorsement—Warranty—Laches.] (1.) Where a note of a third party is transferred for valuable security, being given in payment of goods purchased, and the note is not endorsed by the transferor, a warranty is implied that the maker is not insolvent to the knowledge of the transferor. (2.) If it be proved that the maker of the note was insolvent to the knowledge of the transferor, the party who received it is entitled to offer it back and claim the amount from the transferor, without asking for the rescission of the contract *in toto*. (3.) Art. 1530, C. C., does not apply to such a case, and there being no time fixed by law for offering back such note, it is in the discretion of the Court to determine whether there was laches, and whether the transferor was prejudiced by the delay. *Lewis & Jeffery*, 141.

QUALITY TO SUE.

C. C. P. 14, 19—*Receiver to foreign corporation in liquidation.*] Where an action was brought in the province of Quebec, by the plaintiff as receiver to a corporation in liquidation domiciled in

QUALITY TO SUE—*Continued.*

Ontario, and it was proved by the production of the Ontario Statute that the plaintiff, as receiver, was duly authorized to represent the corporation in judicial proceedings, *held*, that he may also appear in his quality of receiver in judicial proceedings before the courts of the province of Quebec. (Judgment of Taschereau, J., M. L. R., 1 S. C. 166, reversed). *Giles & Jacques*, 456.

RAILWAY ACT OF CANADA.

Award of arbitrators—Prolongation of delay for making award.] Under the Railway Act of 1879, 42 Vict., ch. 9, where the arbitrators appointed to fix the compensation for a property, adjourned to a day subsequent to that originally fixed for making the award, without stating in their minutes that such adjournment was for the purpose of making an award, and at their subsequent meeting the three arbitrators and counsel for the parties were present, and no objection was made to the regularity of the meeting, such absence of objection constituted a tacit ratification of the proceedings up to that time. (2.) An adjournment to enable one of the arbitrators to visit the property, without any date being fixed for the next meeting, did not terminate the arbitration; and an award made on a subsequent day, the three arbitrators being present, was a valid award. (3.) A notarial award is not necessary in the case of an arbitration under the Railway Act of 1879; the entering of the amount awarded in the minutes constituted the actual award; and the fact that on a subsequent day the award was made out in notarial form and signed by two of the arbitrators, the other arbitrator not being present, does not invalidate the award as previously made and entered in the minutes. *Ontario & Quebec R. Co. & Les Curés etc de Ste Anne du Bout de l'Isle*, 110.

RECEIPT.

Given through error—Evidence.] *See* ERROR, 137.

RESERVED CASE. *See* CRIMINAL LAW, 176.

RESPONSIBILITY.

Mare put to pasture—Fault.] A farmer who takes an animal to pasture on his farm, at a rate agreed upon, is only bound to exercise the care of a *bon père de famille*; and if the animal is killed or lost without fault or negligence on his part, he is not responsible to the owner. *Robin dit Lapointe & Brière*, 361.

—— *See* NEGLIGENCE, 214.

ROYAL COMMISSION. *See* CONSTITUTIONAL LAW, 263.

SALE OF IMMOVABLE.

Error as to accessory of thing sold—Damages.] The appellant pur-

SALE OF IMMOVABLE—*Continued.*

chased from respondents at public auction two lots of land on a certain street, and signed a memorandum of sale in which reference was made to the official plan, on which the street was marked as being 51 feet wide at that place. On the surveyor's plan prepared for the sale, the street was also traced as 51 feet in width, but by inadvertence, on the lithographed copies distributed at the auction sale, the part of the street where the lots were situated was represented as of uniform width with the upper part of the street, which was 60 feet wide. In the advertisements, and in the auctioneer's announcement at the sale, the street was also described generally as 60 feet wide. When the error was discovered the respondents (vendors) offered to cancel the sale if the appellant (purchaser) had been misled by the error on the lithographed copies, but the appellant refused, and brought an action of damages. *Held* (affirming the judgment of DAVIDSON, J., M. L. R., 3 S. C. 403,) in an action of damages by the appellant (purchaser), that he having received the full number of square feet bargained for, having refused to relinquish the bargain, having signed the memorandum of sale in which reference was made to the homologated plan showing a street 51 feet wide, and moreover no specific damage being proved, an action of damages could not be maintained. *Inglis & Phillips*, 36.

—— *Unpaid vendor.*] The unpaid vendor is not entitled to ask for the resiliation of the sale of an immovable unless there be a stipulation to that effect in the contract of sale. *McNaughton & Exchange National Bank*, 180.

—— *Purchaser buying free and clear—Hypothecs.*] Where real estate is sold free and clear of incumbrances, the purchaser to pay the price in cash to the vendor, and it appears that the property is charged with hypothecs, the purchaser is not bound to execute a deed unless the vendor, within the time fixed for completing the contract, has caused the hypothecs to be discharged. *Dandurand & Mappin*, 443.

SALE OF MOVABLES.

Sale of Goods—Order obtained by commercial traveller—Acceptance.] In law, and by the custom of trade, the mere taking of an order for goods by a commercial traveller does not complete the contract of sale so long as the order has not been accepted by his principal. And where the latter refuses to accept the order, and gives notice to the person from whom the order was taken, he is not liable in damages. *Brock & Gourley*, 153.

—— *Sale of goods—Slight variation from conditions of contract—Sight draft.*] M. sold McB. ten car loads of peas, price payable by drafts at sight, with bills of lading attached. M., with the first car load, made a draft on demand instead of a sight draft, asking at the same time to be informed whether McB. wanted the rest at sight. McB. refused to accept the draft, or to take delivery

SALE OF MOVABLES—*Continued.*

of the peas, and repudiated the contract. *Held*, that the slight difference in the drafts did not constitute a sufficient reason for McB. to repudiate the contract, as he might have accepted the demand drafts on condition that they would be payable only three days after acceptance; and moreover it appeared that he had repudiated the contract on a different ground before the drafts were presented. *McBean & Marshall*, 277.

SALVATION ARMY.

Lease to.] *See* LESSOR AND LESSEE, 77.

SCHOOL DISTRICTS.

See SUPERINTENDENT OF EDUCATION, 330, 390.

SEIGNIORIAL RIGHTS. *See* WATER COURSE, 233.

SHAREHOLDER. *See* COMPANY, 180.

SHIPPING. *See* CARRIER, 1.

SOLATIUM. *See* DAMAGES, 468.

STREET.

Width of street—Error in Description.] *See* SALE OF IMMOVABLE, 36.

SUBROGATION.

Conventional subrogation—Art. 1155, *C. C., sec.* 2—*Erroneous noting of deed by registrar.*] (1.) Conventional subrogation under Art. 1155, C. C., §2, is effected without any formal or express declaration of subrogation being required, when the debtor, borrowing a sum of money, declares in his deed of loan that it is for the purpose of paying his debt, and in the acquittance it is declared that the payment has been made with the moneys furnished by the new creditor for that purpose. (2.) Where subrogation is given by the terms of a deed, the erroneous noting of the deed by the registrar as a discharge, and the granting by him of erroneous certificates cannot prejudice the party subrogated. (*Desrosiers & Lamb*, M. L. R., 4 Q. B. 51, followed.) *Owens & Bedell*, 395.

SUPERINTENDENT OF EDUCATION.

Decree on appeal from decision of school commissioners—Finality of—R. S. Q. 2055.] Where a petition was presented to the Superior Court for a writ of mandamus against school commissioners, to compel them to enforce a decree of the Superintendent of Education ordering them to maintain a school district and to erect thereon a school house, and the commissioners pleaded that the appeal to the Superintendent was not authorized by three duly qualified visitors as required by law, and that the commissioners had not been heard, *held*, that the pleas were not demurrable. *Commissaires d'Ecole, etc. & Langevin*, 390.

—— *Mandamus—Establishment of a new school district—School visitors—Superintendent of education—Jurisdiction upon appeal—Approval of three visitors*—40 *Vict.* (*Q.*) *c.* 22, *s.* 11—*R. S. Q.* 1951, 2055.] On an application by H. for a writ of *mandamus* to compel the appellants to establish a new school district, in accordance with

SUPERINTENDENT OF EDUCATION—*Continued.*

the terms of a decision rendered on appeal by the superintendent of education, under 40 Vict. (Q.) ch. 22, s. 11, the appellants pleaded, *inter alia*, that the superintendent had no jurisdiction to make the order, the petition in appeal to him not having been approved of by three qualified visitors, *Held*, that inasmuch as one of the visitors who signed the petition in appeal to the superintendent, was the parish priest of an adjoining parish, and inasmuch as, under R. S. Q. 1951, priests and ministers can be visitors only for the municipality in which they reside, the petition in appeal had not the approval in writing of three qualified visitors, and the decision rendered by the superintendent was null and void. *Commissaires d'Ecole etc. & Hus*, 330.

SURETYSHIP.

By Bank.] *See* BANK, 387.

TACIT RECONDUCTION. *See* LESSOR AND LESSEE, 40.

TAXATION.

Exemption from—Insane Asylum—Charitable institution—Exemption —R. S. Q. 2044, 6146.] An asylum for the insane, established and incorporated by an Act of the legislature, and supported chiefly by volumtary donations, the members of the corporation individually deriving no profit from the institution, is a charitable institution within the meaning of R. S. Q. 2044, 6146, and therefore exempt from the payment of municipal and school taxes. *Corporation of Verdun & Protestant Hospital for the Insane*, 299.

TAXATION OF COSTS. *See* PROCEDURE, 451.

TUTOR.

Administration—Grounds for removal of—Art. 285 *C. C.*] (1.) The insolvency of a tutor is not a sufficient ground for removing him from office, where he is not guilty of maladministration or unfaithfulness in the performance of his duties. (2.) The fact that a tutor has left the revenues of the minor in the hands of testamentary executors who were appointed by the father of the minor, and whose capacity and solvency are not disputed, is not a ground for removing the tutor unless it appears that the interests of the minor are prejudiced thereby. *Macfarlane & Stimson*, 397.

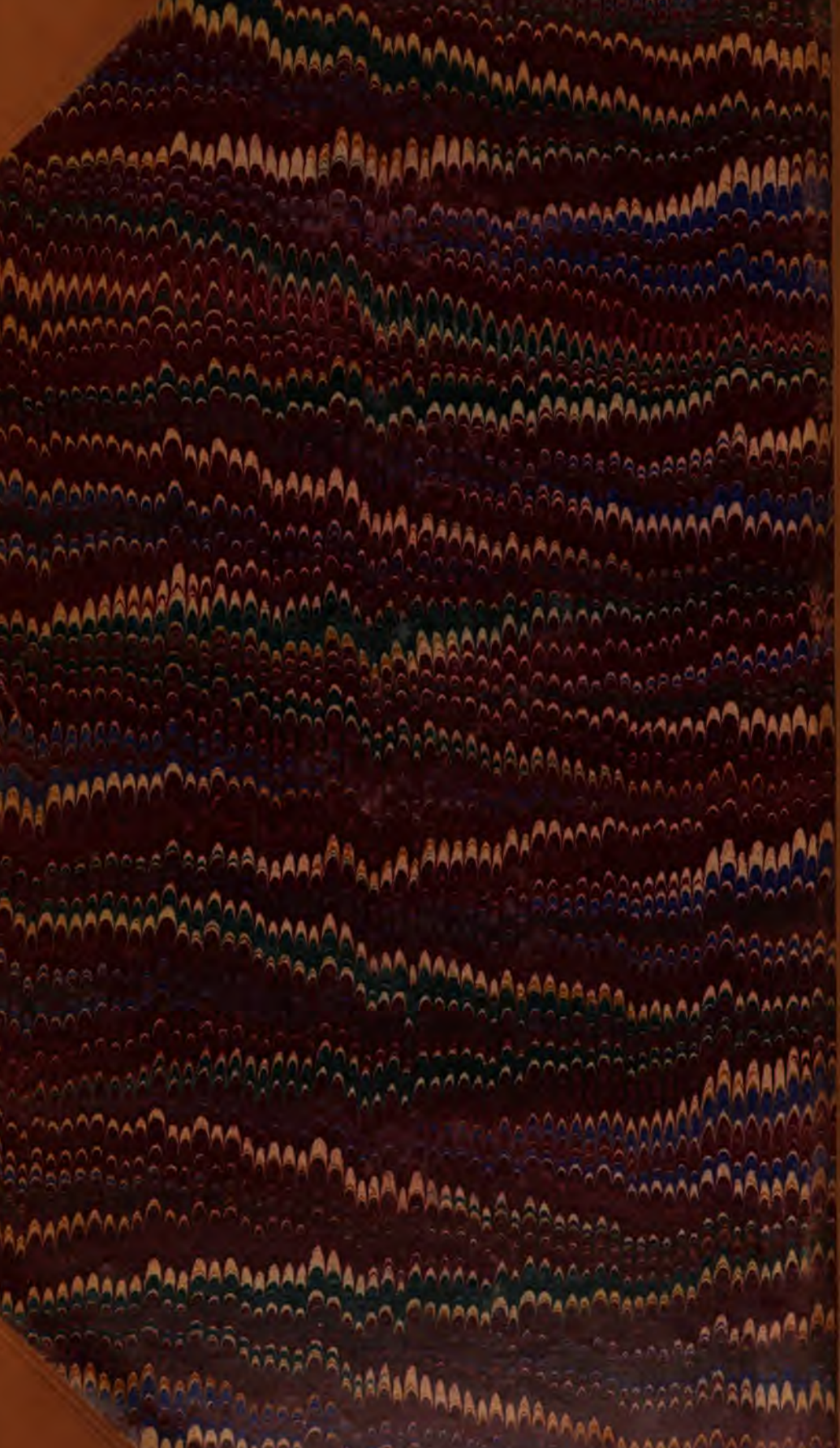
UNPAID VENDOR. *See* PRIVILEGE, 180; SALE OF IMMOVABLE, 180.

VALUABLE SECURITY. *See* CRIMINAL LAW, 413.

WATER COURSE.

Floatable river—Seigniorial rights—C. S. L. C., ch. 51—Expertise—Direct action—Conclusions.] (1) Since the abolition of seigniorial rights a servitude alleged to have been acquired from the seignior previously, for the construction of dams without payment of indemnity, has no effect. (2.) Ch. 51, C. S. L. C., applies to floatable as well as non-floatable rivers. (3.) The remedy given by ch. 51, C. S. L. C., to a person who is damaged by the construction of a dam on a water-course, is not exclusive, and does not deprive him of the ordinary remedy by action before a competent Court. (4.) Where, in such action, the plaintiff prays for the demolition of the dam, and for damages, a judgment which orders the payment of damages as awarded, and in default of payment within the delay fixed, orders the demolition of the dam, is not *ultra petita*. *Bazinet & Gadoury*, 233.

—— *Right to control flow of water.*] The parties are owners of mills situated upon the same stream (neither navigable nor floatable), which is the outlet of a pond. They derived title from the same *auteur*. Respondent owned the dam and the land at the outlet, and also a sawmill and a saw and grist mill, some distance down the stream, and below appellant's mill. Respondent's title was anterior to that of appellant, and gave right "of taking and "using the water from the pond, down to low water level on the "dam on the sold land, without hindrance or obstruction on the "part of the said vendor, his heirs or assigns." Appellant, who had a saw mill below respondent's dam at the outlet of the pond, took his title subject to this privilege. *Held*, that respondent was entitled, under the clause above cited, to control the flow of water from the pond, and to the use of the surplus water, down to low water level on the dam at the outlet. *Merrill & Rider*, 426.

WRIT OF ERROR. *See* CRIMINAL LAW, 163; 232.

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